

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

3
4 LAURA A. GADDY,)
5 individually and on behalf)
6 of all others similarly)
situated,)

7 Plaintiffs,)

8 vs.)

9 THE CORPORATION OF THE)
10 PRESIDENT OF THE CHURCH OF)
JESUS CHRIST OF LATTER-DAY)
11 SAINTS, a Utah corporation)
sole,)

12 Defendant.)
13 _____)

Case No: 2:19CV0554

14
15
16
17
18 BEFORE THE HONORABLE ROBERT J. SHELBY

19 January 5, 2021

20 ZOOM VIDEO MOTION HEARING
21
22
23

24 Reported by:
25 KELLY BROWN HICKEN, RPR, RMR
801-521-7238

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES OF COUNSEL

FOR THE PLAINTIFFS:

KAY BURNINGHAM ATTORNEY AT LAW

BY: KAY BURNINGHAM

Attorney at Law

300 S. MAIN ST, STE 1375

SALT LAKE CITY, UTAH 84111

FOR THE DEFENDANT:

STOEL RIVES

BY: DAVID J. JORDAN

WESLEY F. HARWARD

Attorney at Law

201 S MAIN ST STE 1100

SALT LAKE CITY, UTAH 84111

1 SALT LAKE CITY, UTAH, TUESDAY, JANUARY 5, 2021

2 * * * * *

3 THE COURT: All right, everyone. Let's go ahead
4 and go on the record in Case Number 2:19-CV-554. It's
5 Gaddy vs. Corporation of the President of the Church of Jesus
6 Christ of Latter-Day Saints.

7 Before we begin and before we make appearances, let
8 me just state as I always do, first, that you're all welcome.
9 This is a public and open hearing even though it's being
10 conducted remotely. And the purpose of that, of course, is
11 that we're in the middle of a global pandemic, and the general
12 orders entered by this court prohibit proceedings like this
13 from proceeding in person here in the court. I'll remind
14 everyone that it's unlawful to record official judicial
15 proceedings in federal court by any means and for any purpose.
16 It's unlawful to use a recording for any purpose.

17 So I instruct anyone who's listening or watching
18 not to make any recording of this hearing. There is one
19 official transcript of proceedings in federal court, it is the
20 one official record of proceedings in federal court. It is
21 the transcript being prepared by our court reporter.

22 Having said that, let me invite you, counsel, to
23 make your appearances beginning with the plaintiff. I think
24 Ms. Burningham, I see you. Would you introduce yourself and
25 anyone else appearing with you?

1 MS. BURNINGHAM: Yes, Your Honor. Kay Burningham
2 for the plaintiff Laura Gaddy, and she should be connected
3 from the East Coast.

4 THE COURT: I think I see her online. Is that you,
5 Ms. Gaddy, if you would nod?

6 (Does so.)

7 THE COURT: Great. Thank you.

8 MS. BURNINGHAM: Thank you.

9 THE COURT: And, Ms. Burningham, will there be any
10 other counsel appearing with you today?

11 MS. BURNINGHAM: No, there will not. Mr. Romney is
12 assisting me. He's my assistant, and he's assisting with the
13 technical details.

14 THE COURT: Terrific. Thank you.

15 MS. BURNINGHAM: Thank you.

16 THE COURT: And, Mr. Jordan, I see you on our zoom
17 call. Will you make your appearance and anyone else who's
18 with you?

19 MR. JORDAN: Thank you, Your Honor. This is
20 David Jordan on behalf of the Corporation of the President of
21 the Church of Jesus Christ of Latter-Day Saints. I have with
22 me in my office my associate Wesley Harward. And I also see
23 on the line Mr. Randy Austin and Mr. Alexander Dushku, who are
24 attorneys with the law firm of Kirton and McConkie. That firm
25 represents the Corporation of the President as outside counsel

1 in a variety of matters. And they are joining not to make
2 appearances today, but simply to listen to the proceedings.

3 THE COURT: All right. Well, thank you. Welcome
4 to all of you. Welcome back, I guess I should say to some of
5 you. This is our second hearing on motions to dismiss. Just
6 by way of procedural background, of course, the plaintiff
7 filed her complaint sometime ago. The defendants filed a
8 motion to dismiss. And following oral argument I issued a
9 written memorandum decision dismissing Ms. Gaddy's first
10 complaint without prejudice to replead. Miss Gaddy has
11 re-pled and filed an amended complaint. The defendants have
12 again moved to dismiss.

13 This first part will be familiar to you, counsel.
14 I think we did this in our last hearing. It's my practice in
15 most hearings. Let me inform you what I've reviewed and share
16 with you my preliminary thoughts based on that review.

17 So I carefully reviewed all of your papers. There
18 are four motions pending before us including the motion to
19 dismiss. Ms. Gaddy filed three miscellaneous motions.
20 They're fully briefed. I'll be providing a ruling on those.
21 I don't think there will be any need for oral argument on the
22 three miscellaneous motions.

23 I carefully reviewed the motion to dismiss. I
24 reread several times my prior memorandum decision. I read
25 very carefully the amended complaint, and we have, of course,

1 reviewed more cases than I care to count. I think we reviewed
2 the legal authority. I hope I understand it. I believe I
3 understand your arguments.

4 With respect to the motion to dismiss, and let me
5 say this at the outset, I don't think Ms. Gaddy was with us
6 last time and others. I almost always do this. It's my
7 practice to share at the outset with the lawyers my
8 preliminary view of things. It's just only that, a
9 preliminary review based on my review of the papers and
10 authority. I'm always here with an open heart and an open
11 mind interested to learn what you think I have misunderstood
12 or misapplied.

13 The purpose for sharing these thoughts is to try to
14 help focus our oral argument and just to be transparent with
15 the lawyers so they know where the target is which they're
16 aiming. So here are my thoughts about the motion to dismiss.

17 First, I'm disinclined to revisit my prior rulings.
18 I won't revisit the conclusions that I previously drew in the
19 memorandum decision and order that I entered before. So I
20 think what will be helpful today is to focus on differences
21 between the complaint that was filed and dismissed and this
22 amended complaint as well as there are a number of new
23 arguments or different arguments advanced by the parties, most
24 notably by Ms. Gaddy. Let me see if I can touch on what I
25 think are the central differences and share with you my views

1 about those matters.

2 First, it appears to me that the plaintiff attempts
3 to avoid at least my interpretation of Ballard, and I
4 recognize at the outset that I think Ms. Burningham doesn't
5 share my view about the law at least on some of these matters.
6 But you're stuck with the judge that you're stuck with. It
7 appears that the plaintiffs have attempted to work around at
8 least my construction of Ballard in these ways.

9 First, suggesting that the subject matter in the
10 complaint is conduct and not belief. I don't see any evidence
11 of that in the papers. As I read the amended complaint, the
12 subject matter is focused on belief, doctrinal belief,
13 historical facts as they relate to doctrine, and especially
14 the profession or professing of those beliefs; in other words,
15 speech about religious matters. I think I'm not at least
16 initially persuaded that there's any element of conduct here
17 that would move us outside of the realm of Ballard.

18 There's this I think a great emphasis in the papers
19 on whether this court can receive this complaint and
20 investigate these alleged misrepresentations. If it does so
21 by examining whether the historical facts that are historical
22 beliefs at issue in the complaint are sincerely held by the
23 defendants.

24 Three thoughts about sincerity of belief. I am
25 unaware of any authority supporting the proposition that the

1 sincerity of religious beliefs is a proper subject matter in a
2 case like the one before us. I am, of course, familiar with
3 the RFRA cases in which quite naturally the sincerity of the
4 belief of someone who's seeking an exception or exemption from
5 a government rule or burden is relevant. And I am familiar
6 with the cases. I've read them several times, and they're a
7 little dense and difficult to understand because they're from
8 the 1940s. But I read again Ballard and Rasheed which are
9 cases the plaintiff relies on for the proposition that we can
10 interrogate the defendants in this case and before a jury
11 about the sincerity of their beliefs and their statements
12 about their historical facts and doctrine.

13 I don't think RFRA applies, and it's -- my reading
14 of Ballard is that Ballard does not suggest examination into
15 sincerity of beliefs. The holding in Ballard was narrow, as I
16 read it, and that is you cannot examine a church about the
17 truth or veracity of its religious claims. There was
18 discussion back and forth about that element. In that case
19 the trial court did invite the jury to consider whether those
20 beliefs espoused by the defendants were sincerely held, but it
21 wasn't the subject of any holding by the Court.

22 And to the extent that it's helpful, I'm very
23 persuaded by Justice Jackson's dissent on that case,
24 especially on this issue of the sincerity of beliefs and
25 whether it's appropriate for subject matter for inquiry in a

1 court of law.

2 Rasheed, I'll just -- I'm just not persuaded by
3 Rasheed. I think it's not a persuasive writing from the
4 Ninth Circuit. I think its reliance on -- let's see, well,
5 there was the conscientious objector case, and there was the
6 case from Connecticut that were both cited by the
7 Ninth Circuit in Rasheed for the proposition that we could
8 inquire about the sincerity of the belief and also that
9 religions couldn't avoid liability for fraud by invoking
10 religious views. And I think both of those cases are not
11 strong cases for the Ninth Circuit to rely on. And I don't
12 think that the sincerity of belief was a necessary component
13 to those cases -- to that case.

14 Let me further say, I do want to cite one passage
15 from Rasheed which I think we may be talking about today and I
16 think sort of draws into focus some of Justice Jackson's
17 concerns in Ballard.

18 In Rasheed, the Ninth Circuit said, of course, this
19 a 1981 decision, the Ninth Circuit said on Page, it's 847
20 bleeding on to 848 after describing the nature of the charges
21 against the defendants in that case, Rasheed and Phillips. Of
22 course it was a criminal case for mail fraud. The Ninth
23 Circuit went on to say that: The First Amendment does not
24 protect fraudulent activity performed in the name of religion.

25 The court talks some about what the district judge

1 did there. And then goes on to say:

2 To convict Rasheed and Phillips of mail fraud a
3 jury must have found that they knew of the falsity of their
4 statements pertaining to particular aspects of the Dare to Be
5 Rich program.

6 I think this is problematic for the reasons that
7 Justice Jackson talks about. I think any examination into the
8 sincerity of a religious belief whether it's sincerely held in
9 the context of the fraud case presumes the falsity of the
10 belief in the first instance. And as Justice Jackson says it
11 is unclear how you would untether the truth of the belief from
12 the sincerity of the person holding the belief. I think it's
13 problematic.

14 So I don't think there's authority for the
15 proposition that sincerely held belief gets us outside of
16 Ballard, gets us away from Ballard. But even if I was
17 inclined -- let me further add, the 10th Circuit in 1991 in
18 the Mosier case, that was a prisoner case, a RFRA case, made
19 the point, Judge Baldock did, on behalf of the circuit that --
20 let me read it. I think this is important to get correct. I
21 will admit, it's the not holding of the case, it's dicta, but
22 I think it's -- I think it's accurate. I think it summarizes
23 the view of the 10th Circuit. I'm reading from about Page, I
24 think it's 5 -- it's 1526.

25 Some asserted religious claims may be so bizarre,

1 so clearly nonreligious in motivation as not to be entitled to
2 protection under the Free Exercise Clause. But apart from
3 that narrow category, courts carefully avoid inquiring into
4 the merits of particular religious beliefs in an effort to
5 gauge sincerity. Scrutiny of the validity of particular
6 beliefs largely is beyond our judicial function because
7 religious beliefs need not be acceptable, logical, consistent
8 or comprehensible to others in order to merit First Amendment
9 protections.

10 It's the closest I can tell that the 10th Circuit
11 has come to addressing this question of sincerely held belief.
12 And I think the guidance from the circuit is, you can't ask.

13 I've mentioned Justice Jackson a couple times, and
14 let me share with you this passage because I'm persuaded by
15 it. And again, I'm trying to let you know where the target
16 is. About the sincerity of beliefs Justice Jackson said this
17 joined by Justice Frankfurter and Justice Roberts. I'm
18 reading from Page 92 onto 93 of the Ballard decision.

19 I do not see how we can separate an issue as to
20 what is believed from considerations as to what is believable.
21 The most convincing proof that one believes his statement is
22 to show that they've been true in his experience. Likewise,
23 that one knowingly falsified is best proved by showing that
24 what he said happened never did happen. How can the
25 government prove these persons knew something to be false

1 which it cannot prove to be false? If we try religious
2 sincerity severed from religious verity we isolate the dispute
3 from the very considerations which in common experience
4 provide its most reliable answer.

5 And that seems, that's pretty persuasive to me.
6 Beyond that, if we did accept the plaintiff's invitation here
7 to allow inquiry and interrogation into the sincerity of the
8 beliefs by the defendants, I can't in a million years
9 understand how that's a workable standard in a court of law.
10 I mean, how would we assess the sincerity of the belief held
11 by an organization. And I know that Ms. Burningham cites some
12 cases talking about an organization having a belief. But
13 let's talk about it here. Would there be depositions of the
14 Prophet and the 12 Apostles and Quorum of the Seventy? And
15 what if each person offered different and distinct answers to
16 questions about this. And some of them say they don't know
17 whether these statements are true or false. They take them on
18 faith or they believe some of it but not all of it or they
19 don't believe any of it? They think it might be true or they
20 take it on faith.

21 And we'll get a whole gamut of responses to say
22 hypothetically, how then would we begin to invite a jury to
23 decide whether or not an organization -- oh, and I forgot. At
24 what point in time did they sincerely hold the belief? How
25 would we invite a jury to evaluate the sincerity of the belief

1 held by the Church at an undefined time in an undefined way?

2 I don't understand how that could work in practice.

3 The long and short of all that is I think that the
4 sincerely held belief examination is not one that I can
5 permissibly engage in here nor allow a jury to engage in. I
6 don't think it's a way to escape Ballard. I don't think it is
7 a way to avoid dismissal of the complaint.

8 The plaintiff also advances an argument. It's not
9 a new argument. It was advanced before, but it takes a
10 different form here with respect to the amended complaint.
11 Ms. Gaddy argues that in addition to express fraud all of her
12 claims save for the common law fraud claim can advance on the
13 theory of fraudulent omission.

14 But I think this runs directly into Ballard because
15 a fraudulent omission theory depends in the first instance on
16 the presumption that there's a falsity in the first instance,
17 something that requires further clarification, further
18 disclosure to place in context or to make a statement not
19 misleading or false, again, presumes the falsity of the
20 statement. I think it would require the same examination
21 Ballard says we cannot make whether the statements are true or
22 false in the first instance.

23 There's a line of cases that Ms. Gaddy puts forward
24 and a line of argument about consent. As I understand the
25 significance of consent, it's in Miss Gaddy's efforts to

1 invoke the ministerial exception and rely on the cases talking
2 about the ministerial exception. But this just may be my own
3 limited, maybe I'm just not smart enough to understand it, but
4 I don't understand how the ministerial exception applies in
5 this case in any way, and I don't understand how consent then
6 is a question -- the relevance of that question for purposes
7 of this motion to dismiss.

8 And on that point I'll just note that Bryce was
9 made clear that the church autonomy doctrine, which is the one
10 that is primarily informing my view of the law is broader than
11 the ministerial exception. So I don't think even if the
12 ministerial exception applied in one way it doesn't escape
13 Ballard.

14 The other difference I see here in the amended
15 complaint, material difference, is the treatment of tithing.
16 And as I see it, the plaintiff has changed her theory on
17 tithing at least somewhat. We have the oral contract claim
18 which depends on the tithe, payment of the tithe as
19 consideration for some of the benefits that Ms. Gaddy sought
20 including access to the temple, temple marriage, temple
21 services and blessings and the like. That claim, the oral
22 contract claim, strikes me as being squarely doctrinal. The
23 concept of tithing, the justification, the purpose, the reason
24 for tithing is central to the religious beliefs of the
25 Mormon Church and many churches. And I think it falls within

1 Ballard, as well.

2 The other place that tithing takes a different,
3 takes on a different role here, though, is in the racketeering
4 claim. I understand the plaintiff to submit as a third
5 alternative basis for the racketeering claim statements by
6 Church officials and agents about the use of tithing that
7 Ms. Gaddy claims is false. That strikes me as being outside
8 of the scope of Ballard. At least on the papers I don't think
9 I'm persuaded by the Church's arguments that anything relating
10 to tithing is itself doctrinal in going to the origins, the
11 religious foundation of the Church or its beliefs.

12 And I think this is consistent with Justice
13 Jackson's view in his dissent, I think it's consistent with a
14 number of cases that just because you're a religion, I guess
15 I'm also thinking here of Rasheed, there are countless
16 examples --

17 And let me say for the benefit of those listening
18 we're here on a motion to dismiss under Rule 12. And so for
19 purposes of this hearing, I'm directed to assume the truth of
20 all of the well pled factual allegations in the complaint. So
21 what we're talking about here today are allegations. They've
22 not been proven, and I've not assumed them to be proven.

23 But the allegation is the Church made material
24 misrepresentations about its use of tithing money after it had
25 been received and how it was or was not being used and that

1 that those statements were false. And I think that seems
2 actionable. That seems like an actionable theory against a
3 church. I don't think that it falls within the amended --
4 excuse me -- the affirmative defense that the Church is
5 invoking here.

6 So let me summarize where I think that leaves us.
7 Let me give a preliminary ruling on the three miscellaneous
8 motions, and then let's hear from you, counsel.

9 If after hearing oral argument I held the same
10 views that I've just expressed in my preliminary comments I
11 think what that means at this point is that the plaintiffs and
12 I just part ways on the law as it would apply to the fraud
13 claims -- oh, and I think that as best I can tell those fraud
14 claims are at the heart of all the claims in the complaint
15 except the alternative RICO theory. I think that the
16 consequence would be that all of the claims except the
17 racketeering claim fail and the racketeering claim would
18 survive only on that alternative theory relating to the use of
19 tithing for commercial enterprise related to the City Creek
20 Mall.

21 I have real questions about the adequacy of that
22 theory in view of this complaint. I'll note that I'm not
23 making any rulings about that. The parties haven't argued it,
24 and the defendants didn't raise it. There's not a question
25 here, for example, about whether that claim is adequately

1 pled, could be supported, is actionable otherwise. The only
2 argument advanced by the defendants on that claim and the rest
3 of the complaint is the church autonomy doctrine.

4 Because I would twice have dismissed the remaining
5 claims on the same theories or related theories, it seems to
6 me that we're probably at a point where I would not allow
7 further amendment of those claims, and then I don't know where
8 that would leave the plaintiffs or the defendants in what you,
9 how you wish to proceed. I could imagine the plaintiffs
10 wanting to get on to the circuit to get an answer from a
11 different court or we could proceed here. And I'm raising
12 this now outside the scope of what you've argued because I
13 want to try to serve the parties.

14 If that's where we land, it might be that the
15 plaintiffs would seek to replead the racketeering claim, and
16 that I would permit. I raise this now because I could imagine
17 the defendants contemplating some other motion. But if there
18 is another motion coming it should be directed at a complaint
19 that the plaintiff has had an opportunity to address in view
20 of our discussion today.

21 And that racketeering claim, this theory was not
22 the subject of our earlier hearing, so this would be the first
23 the plaintiff will have had the chance to hear the benefit at
24 least of my views. And if there's -- if there is something
25 that can be corrected I think Rule 15 would require an

1 opportunity to do that. But I will invite each of you before
2 we finish to help me understand where you think we're left, if
3 the ultimate rule is the one that I just shared with you.

4 And now I've already gone on for a long time.
5 Please bear with me for just a moment while I provide you an
6 oral ruling on the three miscellaneous motions. I'll try to
7 be complete yet brief in my reasoning so you all have the
8 benefit of the record for this. I'm not going to ask either
9 of you to prepare and submit a ruling or an order for me to
10 sign. Our docket text -- our minute entry, rather, from this
11 hearing will refer to this portion of the transcript as the
12 Court's ruling on these motions and the basis for the ruling
13 on these motions. They are these.

14 First, Ms. Gaddy's request for oral argument as to
15 defendant's pending motion to dismiss; second, Ms. Gaddy's
16 motion for leave to file additional exhibit to amended
17 complaint; and third, motion for judicial notice. And I will
18 take each up in turn. They are Docket Numbers 53, 57 and 59.

19 So first, the request for oral argument, Docket 53.
20 In this motion Ms. Gaddy makes two separate requests. First,
21 she asks the Court to receive oral argument on defendant's
22 motion to dismiss her amended complaint. And of course, we're
23 having that argument now. The motion is granted in part with
24 respect to her request for oral argument. Our local rule
25 provides that on request motions for oral argument will be

1 granted on good cause shown. That's Rule 7-1(f). There's
2 good cause. We're having a hearing.

3 With respect to judicial notice, that's the second
4 request in her motion, she asks that I take judicial notice of
5 on five items. I'm largely quoting here from her papers.

6 First, the absence of discussion concerning the
7 consent issue in my prior order; second, the absence of any
8 rebuttal to the consent issue arguments raised by the
9 plaintiff in the opposition briefs filed by the defendants;
10 third, the absence in all defense pleadings relating to both
11 motions to dismiss and any rebuttal to plaintiffs' arguments
12 regarding material omissions as not requiring adjudication to
13 the truth or falsity of a statement as it relates to a claim
14 of fraudulent concealment and fraud under RICO. Again, I'm
15 largely quoting from the motion.

16 Fourth, the absence of rebuttal to plaintiffs'
17 argument that RICO does not require a fiduciary duty in order
18 for defendant to commit fraud through a concealment
19 or even omission of material facts; and finally Number 5, the
20 lack of rebuttal to plaintiffs' argument that there is a
21 private right of action under the Utah Charitable
22 Solicitations Act.

23 I'll note that Rule 201 of the Federal Rules of
24 Evidence requires the Court to take judicial notice if a party
25 requests it and the court is supplied with the necessary

1 information. This is Rule 201(c)(2). The 10th Circuit has
2 explained that the rule governs only judicial notice of
3 adjudicative facts as opposed to legislative facts. That's
4 explained in United States vs. Wolny, a 10th Circuit decision
5 from 1998.

6 The Court went on to explain: Adjudicative facts
7 are simply the facts of a particular case, such as who did
8 what, where, when, how, and with what motive.

9 And actually, I'm sorry. That is from the advisory
10 committee note to Subdivision A of Rule 201.

11 In contrast, the Court may not take judicial notice
12 of legislative facts, which are those relating to legal
13 reasoning and the lawmaking process whether in the formulation
14 of a legal principle or ruling by a judge or court or any
15 enactment of a legislative body. That's Federal Rule 201,
16 Advisory Committee Notes to Subsection A.

17 The items in this motion that Gaddy seeks judicial
18 notice of are arguments and analysis or lack thereof. They
19 are not in my judgment adjudicative facts, and for that reason
20 I deny Ms. Gaddy's request to the extent she moves the Court
21 to take judicial notice of those arguments.

22 Turning to Docket 57, Miss Gaddy's motion for leave
23 to file an additional exhibit to her amended complaint and
24 also some additional language, Ms. Gaddy moves under
25 Rule 15(d) of the Federal Rules of Civil Procedure for leave

1 to file those materials. The Church does not oppose the
2 motion. I think it's well taken. There's good cause. That
3 motion is granted.

4 If their complaint survives this motion to dismiss,
5 Ms. Burningham, I'll ask you to submit a revised amended
6 complaint with the additional exhibit and the additional
7 language.

8 MS. BURNINGHAM: Thank you, Your Honor.

9 THE COURT: Thank you. For purposes of our
10 argument today I'll assume that's part of the complaint.

11 The third and final motion that we'll resolve
12 before hearing argument on the motion to dismiss is Docket 59,
13 Miss Gaddy's motion for judicial notice. Here she asks that
14 the court take judicial notice of three items, quote,
15 contained within the Church's official newsroom report or on
16 the online version of the Joseph Smith papers, end quote.

17 The three items that she asks me to take notice of
18 are these, first, quote: On August 4, 2015, defendant
19 published a never-before-seen photo of an opaque brown stone
20 which it claimed was used by Joseph Smith to translate the
21 Book of Mormon, end quote. Second, quote: Eye witnesses
22 claim that when Smith used the stone he placed it in a hat to
23 exclude exterior light, end quote. Third and finally, that,
24 quote: The brown stone has been in defendant's custody since
25 the Mormon pioneers crossed the plains in the mid

1 19th Century, end quote.

2 Again, turning to the rules that govern this,
3 Federal Rule of Evidence 201: The court may take judicial
4 notice of an adjudicative fact only when the fact, quote, is
5 not subject to reasonable dispute because it, number one, is
6 generally known within the trial court's territorial
7 jurisdiction; or number two, can be accurately and readily
8 determined from sources whose accuracy cannot reasonably be
9 questioned, end quote. That's language from Rule 201
10 Subpart B.

11 And as the 10th Circuit explained in O'Toole vs.
12 Northrop Grumman Corporation, quote: In order for a fact to
13 be judicially noticed in disputability is a prerequisite, end
14 quote.

15 The Court went on to explain, the 10th Circuit did,
16 in the Estate of Locket by and through Lockett, a 2016
17 decision, that: Care must be taken at the requisite notoriety
18 exists. Every reasonable doubt upon the subject should be
19 resolved promptly in the negative, end quote.

20 This court will not take judicial notice of the
21 facts relating to the stone found on the Church's official
22 newsroom report or an online version of the Joseph Smith
23 Papers because at least in this court's judgment and in the
24 language of the Lockett this is not the appropriate setting
25 for judicial notice.

1 As the court in Lockett said: Judicial notice is
2 proper when a fact is beyond debate, for instance, what time
3 the sun sets on a given day. When courts have taken judicial
4 notice of contents of news articles they've done so for proof
5 of something that is publicly known, not for the truth of the
6 articles other assertions. That's a quote as I said from
7 Lockett. That's at Page 1111.

8 Here Miss Gaddy asks the court to accept as true
9 the contents of the Church's documents as it relates to the
10 stone, and I decline to do so.

11 So for those reasons Ms. Gaddy's request for oral
12 argument, Docket 53, is granted in part and denied in part.
13 Her motion for leave to file additional exhibit to amended
14 complaint, Docket 57, is granted. Her motion for judicial
15 notice, Docket 59, is denied.

16 Let me ask if either of you wish to make a record
17 about those rulings before we turn to the motion to dismiss.

18 MS. BURNINGHAM: Your Honor, I would only as to the
19 motion for judicial notice. I believe that -- if you'll allow
20 me to do that?

21 THE COURT: Please.

22 MS. BURNINGHAM: Okay. In the reply, and I believe
23 there was a little bit of a misunderstanding, if I may just
24 make my record. We were not asking for, and there was some
25 confusion in the body of the request. In the actual motion

1 it was not confusing. This is verbatim what we wanted that:
2 On August 4, 2015, defendant published a, quote,
3 never-before-seen, unquote, photo of an opaque brown stone
4 which they claimed was used by Joseph Smith to translate the
5 Book of Mormon. Attached is an accurate picture of the brown
6 stone, unquote.

7 We just offer that to show that the event took
8 place and not for the truth of the matter, but only that that
9 was when that happened and it was a never-before-seen event.
10 And also the same with eye witnesses, that those were noted.
11 And lastly, that the brown stone, this is where we amended it,
12 the brown stone has been in defendant's custody before the
13 death of Zina DH Young, one of Brigham Young's wife, on
14 August 28, 1901.

15 The deaths of Brigham Young and his wife Zina are a
16 matter of public record. The defendant in its own literature,
17 yes, it is on the Internet, but it is the same as an admission
18 on the Internet, says that the stone has been in its custody
19 when it was transferred after Brigham Young died to -- but
20 before Ms. Young who donated it, she donated it. And so just
21 by calculation by their respective deaths we could figure out
22 how long defendant has had that stone in its custody and
23 control. And to me that is just -- that's the same as taking
24 notice of an element act when the sun set and the sun rose.
25 But that's my record, Your Honor. Thank you.

1 THE COURT: Thank you, Miss Burningham.

2 All right. Why don't we turn to the motion to
3 dismiss. It is the defendant's motion, but my preliminary
4 comments are not friendly to the plaintiffs' arguments and
5 position, so I think it probably makes most sense to begin
6 with the plaintiff.

7 Miss Burningham, this is the time for your
8 argument. We'll hear any issues you wish to take up. I just
9 shared as I said those preliminary views in the event that
10 they were helpful in framing your argument. Go ahead, please.

11 MS. BURNINGHAM: Thank you, Your Honor. One
12 minute. I've made notes about your tentative ruling, and I
13 think I'll take them in reverse order.

14 Skipping for a moment the tithing argument,
15 sub-argument in the RICO claim, I'd like to go to the material
16 omission. I believe Your Honor stated a fraudulent omission
17 that you were not convinced that that was sufficiently
18 different enough from our other common law claims that would
19 allow us to survive in our RICO case.

20 And, Your Honor, just to clarify, our RICO claim is
21 claim number, the sixth cause of action. The fifth one is
22 violation of the Utah Charitable Solicitations Act. And both
23 of those statutory schemes, both RICO, which as you know is a
24 federal statute, and Utah Charitable Solicitations Act, which
25 is a state law, they deal with material omissions, not

1 fraudulent omissions. And the importance there is that the
2 standard is not what is a reasonable church member or a leader
3 to do, but it's a standard of a reasonable person. What would
4 a person that listens to this pitch, for lack of a better
5 word, to the preaching, to the solicitation, what would they
6 want to know before donating tithing or donating to a certain
7 church? That is a reasonable standard. That is outside the
8 purview in my opinion of the Church Autonomy Doctrine.

9 Now I'd like to read from Grace, which is -- excuse
10 me -- Grace citing Smith. As you know, Your Honor, in the
11 1990s, there was a case called Employment Division vs. Smith
12 where it's a Supreme Court case. And the plaintiff was denied
13 certain city benefits, I believe it was either workers' comp
14 or unemployment, because he violated the local law by smoking
15 marijuana.

16 And the court in Smith came up with a enough
17 standard that -- well, actually they clarified the long
18 history of church and state law on this issue. And they said
19 that, and this is quoted in the 10th Circuit, re-quoted, and I
20 would like to read this for the record.

21 While the First Amendment provides absolute
22 protection to religious thoughts and beliefs the Free Exercise
23 Clause did not prohibit congress and local governments from
24 validly regulating religious conduct.

25 That's the distinction. Preaching is conduct in my

1 mind. Again, I know you addressed that and I respect your
2 opinion. When you go out you preach. You tell others who may
3 not know anything about your religion what it is you believe,
4 what it is your church is about, and that includes its history
5 often. So this is different than just the beliefs that you
6 hold as an individual in your heart or that you share amongst
7 yourselves. I see the difference there.

8 Grace cited Reynolds: Neutral rules of general
9 applicability normally do not raise free exercise concerns
10 even if they incidentally burden a particular religious
11 practice.

12 And they cite Smith once again. The Free Exercise
13 Clause does not relieve an individual of the obligation to
14 comply with the valid and neutral law of general applicability
15 on the ground that the law proscribes or prescribes conduct
16 that his religion prescribes or proscribes. That means if a
17 law is both neutral and generally applicable it need only be
18 rationally related to legitimate governmental interest to
19 survive a constitutional challenge. 10th Circuit case of
20 United States vs. Hardman.

21 On the other hand, if the law burdens a religious
22 practice and is not neutral, then it's subject to strict
23 scrutiny.

24 And then the final phrase that's applicable is: A
25 law is neutral so long as its object is something other than

1 infringement or restriction from religious practices.

2 Your Honor, respectfully both statutes, the RICO
3 statute and Utah statute, on charitable solicitations are
4 neutral laws. They're general laws. They're not targeting
5 the Mormon church or any church, and they should be applied
6 and served by the Church of Jesus Christ of Latter-Day Saints,
7 rather the President of the Corporation of the Church of Jesus
8 Christ of Latter-Day Saints.

9 Now segueing into those two causes of action I'd
10 like to address them.

11 THE COURT: Excuse --

12 MS. BURNINGHAM: RICO does not require adjudication
13 of the truth or falsity of a religious belief. The
14 10th Circuit has specific jury instructions on RICO, and
15 those, if you'll indulge me, I'll just read the key
16 instructions there. And this is not RICO, but the predicate
17 acts of wire fraud and mail fraud, which are what we have pled
18 as predicate acts for our civil RICO claim.

19 The key portion of the 10th Circuit jury
20 instruction on this is, quote: A scheme to defraud is conduct
21 intended to or reasonably calculated to deceive persons of
22 ordinary prudence or comprehension. A scheme to defraud
23 includes a scheme to provide another of money, property or
24 intangible services. An intent to defraud means an intent to
25 deceive or cheat someone. A representation is false if it is

1 known to be untrue or is made with reckless indifference as to
2 its truth or falsity. And here's the key language.

3 A representation would also be false when it
4 constitutes a half truth or effectively omits or conceals a
5 material fact provided it is made with intent to defraud. A
6 false statement is material, and it goes on to describe
7 materiality and causation.

8 There is no duty required for wire fraud and mail
9 fraud violations which again are predicate acts.

10 THE COURT: Ms. Burningham?

11 MS. BURNINGHAM: Yes.

12 THE COURT: I wonder if you and I are just speaking
13 past each other on this point.

14 MS. BURNINGHAM: Okay.

15 THE COURT: I think with respect to your statement
16 of the law about the requirement of compliance with neutral
17 laws of general applicability, I think that's a fair and
18 accurate statement of the law. I understand the Church
19 Autonomy Doctrine from Ballard and its progeny to be an
20 affirmative defense. I mean, the 10th Circuit, the way as
21 best I understand it, the 10th Circuit has said it's a
22 affirmative defense akin to qualified immunity incumbent on
23 the defendant invoking the defense to show its application.

24 Can't both things be true? That is, that churches
25 are required to comply with legal scheme with the laws enacted

1 by congress under different levels of review, strict scrutiny
2 or rational review, but also be true that Ballard and the
3 Church Autonomy Doctrine prohibit the court from applying at
4 least those provisions or those statutes that would require an
5 investigation into the truth or falsity of religious beliefs?
6 Isn't that -- you agree that Ballard is still valid law. It's
7 not been overruled.

8 MS. BURNINGHAM: I believe that Ballard is valid
9 law. But cases involving material omissions do not require
10 adjudication of the truth or falsity of religious beliefs.

11 THE COURT: So that was my first question for you.
12 Looking at the Utah Charitable Solicitations Act and also
13 thinking about what you said about the material facts,
14 disclosure of material facts in RICO, isn't your theory as
15 I've understood from your complaint, you think that there are
16 certain facts that are material that must be disclosed because
17 other facts, other statements that you attribute to the Church
18 you think are false or misleading unless they provide the
19 additional facts that you think they need to supply? Isn't
20 that what makes those facts material in your theory?

21 MS. BURNINGHAM: No, I don't think so. I mean, I
22 can see how you characterize it that way. But if you'll let
23 me explain, I think if we have as we do in this case the key
24 representation or one of three that we've argued since the
25 original complaint is that there is a misrepresentation as to

1 the process that was used in coming up with the Book of Mormon
2 and creating the Book of Mormon as Mr. Jordan used in one of
3 his pleadings. Depicted in the montage of the gold plates as
4 we've shown and through the 70s, 80s, 90s up until 2012 or
5 even later are pictures of Joseph Smith looking directly at
6 the Gold Plates and translating them in the ordinary sense of
7 the word just as you would translate the Dead Seas Scrolls or
8 through a Urim and Thummim described as glasses to a
9 breastplate. There has never been a depiction of Joseph Smith
10 looking at a brown stone in a hat.

11 And I think a person who was a potential convert to
12 the Mormon Church, a reasonable person would want to know that
13 the actual process or that the process that they have evidence
14 of is that he used a brown stone. And they've had the stone
15 in their vault for over 100 years. And that's reasonable
16 thing to know when you're deciding whether or not you're going
17 to believe that Joseph Smith is a prophet. You want to know
18 the process by which the main scripture the Book of Mormon
19 came about.

20 THE COURT: That statement, that argument you just
21 advanced, isn't it dependent on --

22 MS. BURNINGHAM: Isn't it what? I'm sorry.

23 THE COURT: Isn't your argument that you just
24 advanced dependent on your assumption that some of the
25 statements made by the Church are either true or false? I

1 mean, you have made a judgment in your argument that I just
2 heard about what actually happened in your view. And you
3 think that fact needs to be supplied because if it's not
4 anything else that the Church has said about it is false or
5 misleading. But it presumes the truth -- it presumes the
6 answer of the question, doesn't it?

7 MS. BURNINGHAM: Well, I see what you're saying,
8 Your Honor. But I think you can ask -- you can ask somebody,
9 would you want to know the vehicle that was used in creating
10 the Book of Mormon? If there was a brown seer stone, the same
11 one that Joseph Smith used to try to find buried treasure that
12 he found in the well of a neighbor, I mean, I don't think you
13 have to get to the truth or falsity. I think you can just go
14 to that, and you don't need to do that.

15 And if I can use -- I would like to show the stone
16 now since the judicial notice motion was denied. This is a
17 picture of the seer stone. And this brown opaque stone is
18 what was first published in August 2015. And it was never
19 seen before by any Mormon. It was kept in a vault, and it was
20 hidden. And instead, correlation, and this goes back to your,
21 how do we adjudicate sincerity of different leaders of the
22 church. We don't have to do that. What we have to do is
23 realize, and this has been pled in the complaint or the
24 amended complaint and the complaint, that the 15, the
25 brethren, that is the First Presidency and the 12 Apostles,

1 they have the final word in Correlation. What happens is that
2 somebody will write, this is the lesson manual for Sunday
3 School, or, this is what I'm going to say in a speech, or,
4 these are the pictures we're going to use for this ward, and
5 Correlation has to remove those. Correlation is the alterego
6 of the Church, of the Church leaders. They speak as one.
7 They believe as one. And for centuries -- not for centuries,
8 for decades since at least the early 1960s when Correlation
9 was formed as a department they have made a choice to, and
10 there's all sorts of evidence for this, to omit the bad parts
11 about Church history and just paint a rosy picture.

12 In fact, Correlation, this came out in Gregory
13 Prince's biography about Leonard Arrington, who was you know a
14 church history for a while, quote: With some amazement
15 Leonard recorded that the editors first used their own
16 judgment regarding what to publish --

17 This is speaking of Correlation and what things to
18 publish that are correlated material.

19 -- but then submitted it to managing director Doyle
20 Green to check. He in turn worked through Correlation
21 committee review. If a disagreement then emerged the proposed
22 publication went to the Quorum of Twelve where Thomas Monson,
23 Gordon Hinckley and Boyd Packer made the ultimate decisions.
24 There were subjects the editors were not allowed to broach,
25 end quote.

1 This process is the same today. The three members
2 of the First Presidency of the Church of Jesus Christ of
3 Latter-Day Saints, President Russell Nelson, Dallin Oaks I
4 believe is the first counselor and Mr. Eyring, Henry Eyring is
5 the second. They've all been serving in leadership capacities
6 since the mid 80s and have all been involved in Correlation in
7 deciding what version we teach to the members, we teach our
8 missionaries to in turn teach the converts.

9 And unfortunately what has been taught is a half
10 truth, it's a partial truth. And the law we talked about in
11 the past complaint, and I don't mean to bring this up, I don't
12 mean to be disrespectful, but a partial truth, and this I
13 believe is the law in Utah, a duty arises to tell the whole
14 truth if a partial truth is misleading.

15 And that is in Am Jur. We have that. And that's
16 been in the jury instructions for Utah. And I know that's not
17 law, but for as long as I've been admitted to the Bar, which
18 is the mid 1980s, the jury instruction has been that if the
19 defendant made a statement then it had a duty to tell the
20 truth about the matter, to make a fair disclosure and to
21 prevent a partial statement from being misleading or giving a
22 false impression.

23 This is the epitome of what the Church has done.
24 And I don't think Ballard protects them, and I'll tell you
25 why.

1 The Mormon Church has a sincere belief in honesty.
2 They teach their members to be honest. And honesty as defined
3 by the Mormon Church in its 13th Article of Faith is, quote:
4 We believe in being honest, that's only partial, true,
5 benevolent, et cetera, et cetera. Quote: There are many
6 other forms of lying the teach. When we speak untruths we are
7 guilty of lying. We can also intentionally deceive others by
8 a gesture or a look, by silence or by telling only part of the
9 truth, which is what they've done. Whenever we lead people in
10 any way to believe something that is not true we are not being
11 honest.

12 And that's from the LDS Manual of Gospel Principles
13 Chapter 31 on honesty. More recently, of course this is 1982.
14 Marvin J. Ashton, elder, I believe, general authority. Quote:
15 A lie is any communication given to another with intent to
16 deceive, unquote.

17 Now we submitted a case, I'm sure you're familiar
18 with this case, US vs. Jeffs, Lyle Jeffs. It was before
19 Judge Stewart. And the question there was whether or not
20 Mr. Jeffs could use his sincere belief or whether it was
21 sincere in the doctrine of -- I'm thinking -- the United
22 Order, whatever that doctrine is. I've lost the word. The
23 doctrine where you put everything together.

24 Pardon? Yep. Consecration, there we go. Okay.

25 The Court -- there's a law about how you use food

1 stamps for everybody listening who's not familiar with it, and
2 I'm sure you are, Your Honor. But there's a law how you use
3 food stamps. And the FLDS Church, which is a fundamentalist
4 sect, which is not the church that we're involved with, the
5 corporation of the mainstream LDS Church, but the FLDS Church,
6 their members were getting food stamps including their
7 leaders, and they were in turn donating either the food or, I
8 don't recall the exact facts, but they were donating it into a
9 bishop's warehouse or consecrating it so everybody could use
10 the proceeds of food stamps.

11 Well, Judge Stewart examined that and found that
12 most of the members did believe in the law of consecration,
13 but Lyle Jeffs didn't believe it because he had special
14 privileges. He didn't abide by it. So for him to raise a
15 sincerely, have a belief in consecration that was an issue of
16 fact, so the motion to dismiss was not granted for them
17 because that was an issue of fact.

18 In the case we have here with Laura Gaddy, free
19 agency is an LDS doctrine. If you remember, and I don't know
20 your background, of course, but Mormons are taught that in the
21 preexistence there was a war in heaven and that Jesus Christ
22 and Lucifer were brothers. And that one plan was proposed by
23 Lucifer, and it was essentially that, I'll go down and I'll
24 force or I'll make the humans do everything that you want them
25 to do; and the other plan was Christ's plan where he said, I

1 will leave it up to them. I will give them freedom and free
2 agency of free choice. And a third of the host of heaven went
3 with Lucifer who became known as the devil, and he wanted to
4 manipulate the free agency of the spirit children. But then
5 Christ had the two thirds.

6 And free agency has been taught every decade
7 including this most recent one. It started in 1971, Elder G.
8 Smith: They gave up their right and claims free agency. They
9 didn't learn the full consequences of that decision. They
10 lost their right to choose, the right to make their own
11 decisions, speaking of the war in heaven and what happened.

12 Go down to 1987 with James E. Faust. I was
13 roommates with his daughter. He was a great guy. Sorry.

14 The devil came before Christ and proposed to God,
15 the Father, behold here I am. Send me. I will redeem all
16 mankind. Not one soul shall be lost. This he proposed to do
17 by force destroying the free agency of man. Free agency given
18 us through the plan of our Father is the great alternative to
19 Satan's plan of force.

20 1987, Dallin Oaks. Free agency, the power to
21 choose and direct our thoughts and actions is a gift of God,
22 and we should resist any means that would compromise it.

23 2006, Wolfgang H. Paul, Second Quorum of the
24 Seventy. Quote: Every intelligent being must have the power
25 of choice.

1 The problem, Your Honor, is that the Church teaches
2 their members one thing, honesty and free agency, and they do
3 the exact opposite. They manipulate the members by telling
4 partial truth, half truths, not disclosing things that a
5 reasonable person would want to know about their history, and
6 they force them basically to do what they think is right
7 without giving them a choice.

8 Thus, the Church does not have a sincere belief in
9 what they are doing in the manner that they preach, because
10 Correlation as a unit with one belief in that we need to --
11 you know, we need to, and I don't think it's -- I think there
12 is an intent to deceive. I'm not assigning a moral component
13 to this. They do intend to manipulate and deceive the
14 members. I think they feel that it's for their own good, but
15 that does not excuse them. And if they don't have a sincere
16 religious belief in doing that, and even Dallin Oaks has
17 said, we don't believe in lying to the Lord. If they don't do
18 that but if their beliefs are the opposite or 180, I think
19 that puts them outside Ballard, and I don't think that Ballard
20 protects them in that type of scenario.

21 Unless you have a question I'll go on to something
22 else.

23 THE COURT: Well, I think you've meant to include
24 in that portion of your argument the discussion about a
25 sincerely held belief. Is the truth static in your mind? Is

1 the formation of the belief static, or is it subject to
2 evolution temporally and by subject? And how do we test it?
3 How would you propose that a jury would evaluate the sincerity
4 of the belief of the Church?

5 MS. BURNINGHAM: Well, certainly I don't believe
6 truth is static. And I think certain things -- an open-minded
7 person is open to all things. But if the Church has had in
8 their vault for over 100 years the brown seer stone and has
9 never -- virtually never mentioned it, never displayed it,
10 never depicted it, in its missionary manuals, in its -- all of
11 its teachings, all of its correlated materials, it teaches
12 that Joseph Smith translated the Book of Mormon directly from
13 Gold Plates. That's a manipulation. And I don't think -- I
14 think, and this may help explain this.

15 If you bring up the elements of fraud, we've all
16 been taught that the elements of fraud, the first one is that
17 a statement was false. And I'll just look at those for a
18 minute. But that's just the order that we learn in law
19 school. We don't necessarily have to try a case in that
20 manner.

21 So the usual elements of fraud, and I've broken one
22 up, but these are essentially the elements of fraud. One, the
23 defendant made a statement about an important fact. The
24 statement was false. It made the statement knowing it was
25 false, or it made it recklessly without record of its truth.

1 Okay. I'm just talking about the first three
2 elements, not reliance and damages. Let's change the order.
3 Let's go down.

4 The Corporation of the President of the LDS Church
5 made a statement about an important fact, and it made a
6 statement without a sincere belief in it or made it recklessly
7 and without regard for its truth.

8 You can put that to a jury without getting to the
9 fact that the statement it made was, in fact, false. That can
10 be after. This can be bifurcated. You can ask them to decide
11 whether or not they had a sincere belief in it. They can be
12 shown certain things that happened and that they did. We're
13 not asking you, ladies and gentlemen of the jury, to decide
14 how the Book of Mormon was really created. We're only asking
15 you given the fact that the Church had this stone in their
16 vault for 100 years and never depicted it, do you think that
17 they sincerely believe that the way the Book of Mormon was
18 translated is the way they depicted it for decades and decades
19 directly from the Gold Plates?

20 Those are two separate questions. And I really
21 think that's the way that can be done, especially when
22 sincerity is at issue. I don't know if I answered your
23 question.

24 THE COURT: If we accept your invitation to have a
25 jury weigh in on the sincerity of the belief of the Church at

1 whatever time --

2 MS. BURNINGHAM: I'm sorry. I didn't hear that
3 last phrase. The belief in the Church what?

4 THE COURT: At whatever time, at some point in
5 time --

6 MS. BURNINGHAM: Okay.

7 THE COURT: -- maybe when the statement is made,
8 how do we avoid what seems to me to be the principle that
9 motivated the rule in Ballard? In Ballard the Supreme Court
10 said -- now I'm just reading from my own previous order. This
11 is Page 8. But this is the quote. I think this is the
12 concept that gives rise to the Church Autonomy Doctrine, and
13 it seems to me your invitation invites the same concerns. The
14 Supreme Court said:

15 Men may believe what they cannot prove. They may
16 not be put to proof of their religious doctrines or beliefs.
17 Many take their gospel from the New Testament, but it would
18 hardly be supposed they could be tried before the jury,
19 charged with the duty of determining whether those teachings
20 contained false representations. The miracles of the New
21 Testament, the divinity of Christ, life after death, the power
22 of prayer are deep in the religious convictions of many. If
23 one could be sent to jail, and I'll just add or bankrupt,
24 because a jury in a hostile environment found those teachings
25 false, or I'll add, or concluded they weren't sincerely held,

1 little indeed would be left of religious freedom. The
2 religious views espoused by respondents might seem incredible
3 if not preposterous to most people, but if those doctrines are
4 subject to trial before a jury charged with finding their
5 truth or falsity then the same can be done with the religious
6 beliefs of any sect. When the triers of fact undertake that
7 task they enter a forbidden domain.

8 My question is, isn't the same harm occasioned upon
9 a church if we invite a jury, a potentially hostile jury, to
10 draw a conclusion about something that can't be proven and
11 risk imprisonment or judgment?

12 MS. BURNINGHAM: Well, first of all, Your Honor,
13 this is not a hostile jury. This would not be hostile. You
14 can expect, I sure you know this, that there would be many
15 Mormon in the venire panel.

16 But regardless of that, sincerity is adjudicated in
17 RFRA cases all the time. And in this case I see it as a
18 matter of credibility and the credibility of the combined
19 correlated position or belief versus, and this comes back to
20 the factors of belief distinction, and I know you don't want
21 to revisit that and I understand that. But belief in
22 doctrine, certainly a civil court cannot adjudicate whether
23 blood atonement or what polygamy, celestial marriage -- excuse
24 me -- is an appropriate doctrine, whether baptism for the dead
25 is appropriate. No, they can't adjudicate that. But the

1 Supreme Court recently said in Omni care, the state of mind of
2 a person is something that can be adjudicated. That is at
3 fact that is capable of misrepresentation.

4 The fact that the Church spun this story, and
5 that's not really up for debate. But, you know, you have to
6 accept my allegations as true for purposes of the motion. But
7 the fact that they only told part of the story or part of what
8 occurred or what they had access to as part of the artifacts,
9 that is a misrepresentation of fact in and of itself. And, I
10 don't know. I just don't see that it would be that difficult.

11 Now, I've tried, you know, a dozen or more cases,
12 well, almost two dozens cases, but, of course, Your Honor, I
13 defer to you. It would be difficult, but a case comes to mind
14 where it says that, and I can't remember the exact language,
15 but these kinds of issues are very difficult. And sometimes
16 there's a fine line that you need to walk, and it needs to be
17 walked, because otherwise if we take this to the extreme this
18 is why we have affinity fraud. This is why Utah is the
19 largest, the most, the worst case in the nation for affinity
20 fraud, meaning that good members of the Mormon Church and
21 leaders of the Mormon Church, bishops and other people,
22 seminary teachers, the list goes on and on and I'm sure your
23 familiar with them, but they're able to entice or to garner
24 investments into whatever scheme they have because they're a
25 good Mormon. And Utah outweighs by more than twice Florida,

1 which is the next closest state.

2 And the problem is it's not that hard from what
3 we're doing now. Mormons, there's two separate groups of
4 Mormon. There's the average lay Mormon, and then there are
5 the lay leaders that work in conjunction with the corporation
6 leaders. And they're very different. And they have different
7 goals, and some of them overlap, yes. But they are
8 manipulated. The average Mormon person is manipulated by the
9 defendant.

10 And even what Mark Pugs ley said in that chart on
11 how Utah is the largest or has the most cases of affinity
12 fraud, he says it's because there is, the people of Utah are
13 simply too trusting. When you teach -- when you teach these
14 people to be honest, to be sincere, to have free agency that
15 even a look can be a lie and that you need to not omit
16 material information or tell partial truths they think that
17 the leaders do the same thing. So they trust the leaders, and
18 they trust the people who are good Mormons and they invest.

19 And this is what leads to all the damage that we
20 have referenced in the faith crises report. People that do
21 that and people that get involved in Mormonism they have
22 cognitive dissonance. And they can't justify when they learn
23 all these facts that are true that they find out about what
24 the church has hidden from them for years, hidden from them,
25 they can't reconcile the two different teachings and reality

1 in their mind, and they become very depressed.

2 And, in fact, the Church at this very moment is
3 negotiating with building mental health centers along the
4 Wasatch Front. They recognized this is a problem, and this is
5 a problem that they created. This kind of thing will not be
6 abated, and it needs to stop. And the Church needs to own up
7 to what it has done. And if it doesn't sincerely believe as
8 an affirmative defense, back to your question, this is an
9 affirmative defense.

10 The Church did not identify in the motion to
11 dismiss what exactly they were protecting. Now, if it's
12 preaching, which I'm just presuming, that's the same as in the
13 Jeffs case, the Lyle Jeffs. The Court in US vs. Jeffs made
14 this really good observation, and I'd like to read that. And
15 they're talking about, he's talking about burden. And the law
16 as you know is that unless it's a substantial burden to the
17 free exercise, a small or minimal burden is not enough to keep
18 defendant from having to comply with the general law. And
19 again, which would be RICO and the Utah Charitable
20 Solicitations Act.

21 This is what the Court said in Jeffs: The same
22 cannot be said here -- meaning referring to infringing upon a
23 free exercise right of the defendant. The defendants are not
24 prevented from teaching the law of consecration.

25 Defendants here in Gaddy are not prevented from

1 teaching that Joseph Smith created the Book of Mormon. He was
2 inspired by God, and God inquired him to create it. They can
3 teach that. They just can't teach something that -- they just
4 can't omit talking about the brown stone. If the brown stone
5 was used they need to disclose it because a reasonable
6 potential convert would want to know that. Continuing on in
7 the Jeffs case.

8 The defendants retain the right and ability to
9 teach. Those who have ability to do so with specific
10 reference to SNAP, that's the food stamp law, benefits may be
11 somewhat limited. But it is one thing to curtail various ways
12 of expressing belief for which alternative ways of expressing
13 belief may be found; it is another thing to require a believer
14 to defile himself -- this is speaking about another case where
15 a prisoner had a choice to eat I think it was pork which is
16 determined to be defiling yourself in his religion.

17 So what we are doing is at most the SNAP statutes,
18 the food stamp statutes and regulations curtail various ways
19 in which the defendants can express their beliefs leading open
20 other methods of expressing those beliefs. Thus, defendants
21 have not shown that they're sincerely held religious beliefs
22 related to teaching the law of consecration are substantially
23 burdened by the SNAP statutes and regulations.

24 This is something that the defense has pointed out.
25 They don't seem to think we have to go through the burden

1 analysis or the free exercise analysis. They seem to think
2 that the Church Autonomy Doctrine just protects them like a
3 shield over all of this. I don't believe that that's the way
4 that the law should be interpreted or is interpreted. And I
5 think they have to show that there's a sincerely held
6 religious belief that will be substantially burdened. And
7 even then I don't think that's the standard. Let me strike
8 that for a moment.

9 I think the standard is if it's a general and valid
10 law of general applicability then they have to comply. The
11 only out for them, the only way of noncomplying is to show
12 that it would just be against their religion to tell the
13 truth, to tell the whole truth and nothing but the truth, to
14 reveal these things that they have hidden. Is that against
15 their religion? No, because they believe in being honest, and
16 they believe in free agency. They can't do that. It does not
17 make sense for them.

18 THE COURT: Have you shared with me,
19 Miss Burningham, everything you wanted to say about how we
20 would apply your sincerely held belief standard in this case?

21 MS. BURNINGHAM: Let me think for one moment, Your
22 Honor.

23 THE COURT: Of course. And let me be clear. I'm
24 asking, if I adopted your approach, have you answered my
25 question about how it would work?

1 MS. BURNINGHAM: Have I answered your question
2 about how it would work?

3 THE COURT: Have you told me what you wanted to?

4 MS. BURNINGHAM: I see what you're saying. I
5 envision -- let me make it more pointed and clear. I envision
6 you would have a group of jurors, and we would be able to
7 submit -- I could take the depositions of half a dozen people
8 as representatives of the first presidency and Correlation,
9 and we would just ask about certain things. And we would have
10 a limiting instruction to the jury telling them that you
11 can't -- you can't determine whether or not the stone was, in
12 fact, used to create the Book of Mormon, but you can only
13 determine whether it was an important part that somebody would
14 want to know, that a reasonable person would want to know, and
15 that Correlation who is the alterego of the defendant, that
16 Correlation was sincere in its belief in not teaching that the
17 stone was used given the fact that it had it in the vault for
18 years, and given the fact that the Church teaches that honesty
19 and free agency are important principles that everyone should
20 abide by.

21 THE COURT: With respect to your theory, it's your
22 Subpart C theory in your racketeering claim, your Fifth Claim,
23 that the Church made misrepresentations about how its tithing
24 was going to be used or was being used --

25 MS. BURNINGHAM: Yes, Your Honor.

1 THE COURT: -- that theory is expressly invoked
2 only in support of your Fifth Cause of action; is that right?

3 MS. BURNINGHAM: Yes, Your Honor -- well, no. I
4 actually plead it all the way through as -- you know, frankly
5 I'd have to look at the amended complaint. I can't recall off
6 the top of my head. It is in the Fifth, the RICO claim. And
7 I believe it's also in the Utah statute for charitable
8 solicitations, but I have to look.

9 THE COURT: I didn't see it there.

10 MS. BURNINGHAM: Okay.

11 THE COURT: Maybe while Mr. Jordan is speaking or
12 we'll take a brief break --

13 MS. BURNINGHAM: I'm sorry. I'm having a bit of a
14 problem.

15 THE COURT: I'm sorry. I'm trying to speak up.
16 Maybe when Mr. Jordan is speaking, or we'll take a break in a
17 moment. We've been going for about an hour and a half.

18 MS. BURNINGHAM: Okay.

19 THE COURT: Maybe you can look and you can let me
20 know if you think you made expressed reference to that theory
21 in support of any of your other causes of action besides the
22 RICO action.

23 Before we break then, Ms. Burningham, have we touch
24 on all the subjects you wanted to address in your argument?

25 MS. BURNINGHAM: No. I do have a few more, Your

1 Honor. And while we're at the tithing -- on the point of the
2 tithing sub-argument under RICO Fifth Cause of action -- or
3 the Sixth Cause of action, rather, if I can address that?

4 THE COURT: Thank you.

5 MS. BURNINGHAM: Thank you. Yes. The tithing
6 slips, and I may be repeating myself. But they're printed by
7 the Church, and they give specific areas that the tithing will
8 be used for, ward missionary, general missionary, Book of
9 Mormon, humanitarian aid, temple construction, perpetual
10 education and other. And they would believe, a normal Mormon
11 would believe that they would be used generally for what they
12 check or what they want them to be used for.

13 And that goes along with the tithing argument
14 that -- well, I don't even have to go over that because Your
15 Honor has already found that --

16 THE COURT: Have you alleged that -- have you
17 alleged in the complaint that tithing is used for a different
18 purpose? Let me ask a different question.

19 MS. BURNINGHAM: Yes.

20 THE COURT: In the context of your racketeering
21 claim or this theory, have you made an affirmative allegation
22 that there's a misrepresentation because tithing is being used
23 for -- the closest I could understand you got was you were
24 focusing on representations about the City Creek Mall.

25 MS. BURNINGHAM: Yes.

1 THE COURT: A for profit venture.

2 MS. BURNINGHAM: Yes. And Deseret -- yes. And the
3 insurance company.

4 THE COURT: Have you alleged that there's a
5 misrepresentation concerning any of those things?

6 MS. BURNINGHAM: Yes, Your Honor.

7 THE COURT: Have you alleged that those statements
8 are false?

9 MS. BURNINGHAM: Yes, Your Honor.

10 THE COURT: Where did you allege that?

11 MS. BURNINGHAM: Let me see if I can find that.

12 THE COURT: Are you relying on Subpart S of your
13 lengthy statement of reasons to doubt the sincerity of the
14 Church's views about things? That's in, what? This is
15 Page --

16 MS. BURNINGHAM: Referring to the amended
17 complaint?

18 THE COURT: Right. This is in -- it's right before
19 Paragraph 143. Your complaint is not numbered, but I think it
20 is ECF Page 46.

21 MS. BURNINGHAM: Okay. Let me just go down to
22 that.

23 THE COURT: It's the IRS whistleblower complaint.

24 MS. BURNINGHAM: Yes.

25 THE COURT: Is that the -- is that the allegation

1 that you think supports -- well, is that where you pled that
2 statements about use of tithing in support of the City Creek
3 Mall are false?

4 MS. BURNINGHAM: Yes, Your Honor. I believe that's
5 right. Let me just look at that to make sure. If you'll give
6 me one minute.

7 And also Paragraph 79, I'm not sure if that's
8 Paragraph 79, if you could page up to that, maybe. This was
9 in the facts of the case of the amended complaint. This has
10 the most particularized and specific -- and I'll just read a
11 few sentences from that. There are several --

12 THE COURT: I've got it here.

13 MS. BURNINGHAM: Okay.

14 THE COURT: What I didn't see was where you pled
15 the facts that would establish that these statements are
16 false.

17 MS. BURNINGHAM: Yes, Your Honor. If you drop down
18 to halfway through Keith McMullin, then a member of the
19 Corporation of the Presiding Bishopric, told the Tribune, not
20 one penny of tithing goes to church profit endeavors.

21 THE COURT: Ms. Burningham, when you're reading
22 you're going really quickly.

23 MS. BURNINGHAM: I'm sorry.

24 THE COURT: And my court reporter can't keep up
25 with you.

1 MS. BURNINGHAM: I'm sorry. I'll just read that a
2 little slower then.

3 Keith McMullin, then a member of the Corporation of
4 the Presiding Bishopric, told the Salt Lake Tribune, quote,
5 not one penny of tithing goes to the Church's for profit
6 endeavors.

7 And at the same time if you drop down to
8 Footnote 31, at the time the statement was made in 2012,
9 Mr. McMullin had already issued checks from EPA's accumulation
10 of tithing principle for City Creek Mall development and the
11 Beneficial Life Insurance Company bailout. And this is based
12 on a lower complaint.

13 Are you asking me if I expressly pled that this
14 statement was false, and they knew it was false and they knew
15 it was false under common law fraud?

16 THE COURT: No.

17 MS. BURNINGHAM: Okay.

18 THE COURT: I think you've answered my question.

19 MS. BURNINGHAM: Okay. Thank you. I incorporate
20 as everybody does all the facts in each of the causes of
21 action. So that is a more specific iteration of those facts,
22 Your Honor.

23 THE COURT: I interrupted. You were speaking about
24 tithing, and there was something else you wanted to touch on
25 before we break.

1 MS. BURNINGHAM: Okay. You know, this might be
2 a -- let's see. This might be a good place to break now
3 because I frankly lost my train of thought.

4 THE COURT: All right. Why don't we do this.

5 MS. BURNINGHAM: But, Your Honor, just to clarify,
6 I do have -- from your tentative I do have two or three other
7 sections that I would like to address.

8 THE COURT: Let's break now and come back and do
9 that so that our court reporter can stretch her fingers.

10 MS. BURNINGHAM: They should be brief in light of
11 what has already been talked about. Thank you.

12 THE COURT: It's 3 o'clock. Why don't we plan to
13 resume at 3:10. And, counsel, at least, let me ask you just
14 to maybe mute yourself and turn off your videos. But please
15 stay connected to the Zoom hearing so we can resume and so we
16 don't have to reconnect you all.

17 MS. BURNINGHAM: Thank you, Your Honor.

18 THE COURT: Thank you. We'll be in recess.

19 (Recess.)

20 THE COURT: Thank you. Are we all ready to go,
21 Mr. Jordan?

22 MS. BURNINGHAM: Your Honor, I just have a few. I
23 won't have long.

24 THE COURT: Let's go ahead and go back on the
25 record.

1 Go ahead, Ms. Burningham. You have the floor.

2 MS. BURNINGHAM: Not to make too fine a point on
3 it, but as to your procedural question, how does this work,
4 the question when you empanel the jury you ask these members
5 who were involved and who guided and who told Correlation what
6 they could say and what they couldn't say, did you have a
7 sincere belief in what you were telling us? Did you believe
8 that Joseph Smith translated directly from Gold Plates or
9 while you were preaching that in the mission field and to the
10 young people, in the back of your mind did you know that there
11 was a brown stone in the vault that you were keeping hidden?

12 That's a question of sincerity and a question that
13 needs to be asked in this case because if the answer -- or if
14 a jury comes back and says no, whether by no impeachment or
15 other evidence that comes into evidence with a limiting
16 instruction, then there's no reason for the affirmative
17 defense to apply. And we try the case as any other fraud case
18 because the belief has to be sincere. There has to be a
19 sincere religious belief in order for Ballard and the Church
20 Autonomy Doctrine to apply. That's just my point on the
21 procedural matter.

22 Now I'd like to show you just a video that goes to
23 this point. And this could be introduced perhaps with a
24 limiting instruction. This is Russell Nelson who in May of
25 2020, this is May of 2020, this is the first time that anyone

1 has shown what they have known to have happened.

2 (Video played.)

3 MS. BURNINGHAM: Now, I just wanted to play that.
4 It's so short. But I just want to say that I really respect
5 him for doing this at this point. It's late, but at least
6 he's disclosing what they have known for a long time. One
7 more time.

8 THE COURT: Miss Burningham, it's outside the four
9 corners of the complaint. It's not properly before the Court
10 in Rule 12. We've seen it. I've seen what you showed us.

11 MS. BURNINGHAM: Okay.

12 THE COURT: I don't think we need to see it again.
13 I'll just make a notation for the record here that as is --

14 MS. BURNINGHAM: All right.

15 THE COURT: -- as is my practice in the courtroom
16 when a video is played, I don't ask the court reporter to try
17 to transcribe it. So we didn't try to transcribe the video
18 that you played, and it's not incorporated in the record for
19 that reason. But I saw it. I understand what you're saying.
20 Go ahead.

21 MS. BURNINGHAM: All right. Let me just look at my
22 notes for one minute, Your Honor.

23 I just don't think -- in conclusion I don't think
24 that the Church has identified which sincere belief is in
25 jeopardy by complying with either common law fraud or the

1 statutory causes of action that we pled, and I think that they
2 have to do that.

3 Now, not with common law fraud and fraud in the
4 inducement, those truths, sincerity is an element of those two
5 claims so we have the burden of proof on that. But on all of
6 the other if a duty is found where partial truth has been
7 disclosed, then one has the duty to tell the whole truth or
8 make enough disclosures so it's not misleading. Without the
9 elements of common law fraud they have to show us that it's a
10 sincere belief. It's their burden in order to have the
11 affirmative defense apply.

12 And that's all I have to say right now. Thank you.

13 THE COURT: All right. Thank you.

14 Mr. Jordan?

15 MR. JORDAN: Thank you, Your Honor. And let me say
16 from the outset that I appreciate your preliminary ruling. It
17 gives me guidance, and I think it helps me to significantly
18 abbreviate my remarks today.

19 First of all, I want to follow the order of things
20 that Your Honor presented when you laid out what you described
21 as the central differences between the original complaint and
22 the amended complaint. And I think the Court correctly
23 identified one of the significant problems in the way that
24 Ms. Gaddy has re-pled the case.

25 Whereas, the first go-round she attempted to set up

1 what I think is a false dichotomy between fact and belief.
2 She now sets up another false dichotomy between conduct and
3 belief. That's significant for First Amendment jurisdiction
4 because the courts could not be more clear and Your Honor
5 could not have been more clear in your order that when we
6 analyze a conduct under the Free Exercise Clause of the
7 First Amendment we are not including speech about belief.
8 That's why Your Honor's ruling on Page 15 says this:

9 But the Supreme Court has repeatedly confirmed that
10 the free exercise of religion encompasses not only the freedom
11 to believe but also the right to profess those beliefs through
12 proselytizing. Said another way, the Church is no more liable
13 for preaching and teaching its beliefs than it is for
14 espousing them.

15 And it's this failure to distinguish speech about
16 belief from conduct that I think leads Miss Burningham into
17 many of the flaws in her argument.

18 So for example, all of the cases that she cites,
19 the prisoner cases, the conscientious objector cases, the
20 marijuana cases, all of those cases deal with conduct. They
21 don't -- they deal with somebody's desire to smoke marijuana
22 and whether a prison restriction on the use of marijuana is
23 unconstitutional or not under the Free Exercise Clause or
24 many, many other ways that that same issue comes to light.

25 But all of those cases deal in the context of

1 conduct like using marijuana or peyote or refusing to serve in
2 the military or whatever it might be, none of those cases, not
3 one, and I'm not aware of a single authority and I don't
4 believe there is one, that says that someone's ability to
5 teach or preach their beliefs is subject to any level of
6 scrutiny or any form of balancing test under the free exercise
7 strand of the First Amendment.

8 And because that's true, all of her arguments about
9 burden shifting and balancing tests are unavailing because all
10 of them failed to give proper regard to the distinction that
11 the Supreme Court has been careful to draw between on the one
12 hand belief and speech about your belief, preaching and
13 teaching your belief, on the one hand; and conduct on the
14 other hand. So I think that is responsive to much of her
15 opposition to the motion to dismiss.

16 Now, I think Your Honor's second point was that in
17 the second -- in the amended complaint Ms. Gaddy has much to
18 say about sincerity and how somehow the concept of sincerity
19 of belief circumvents what would be the ordinary
20 constitutional analysis under the Church Autonomy Doctrine,
21 which is an amalgam of both the Free Exercise Clause and the
22 establishment clause.

23 I'll say this about sincerity. I think Your Honor
24 started in exactly the right place. I too, find
25 Justice Stone's comments in his non-majority opinion in

1 Ballard to be just logically correct. And Your Honor quoted
2 them, but let me just say it again for emphasis.

3 For me the most salient piece of this opinion is
4 this:

5 How can the government prove these persons knew
6 something to be false which it cannot prove to be false?

7 I'm sorry. It's not Justice Stone. It was
8 Justice Jackson. Justice Jackson's comment is unassailable
9 logic. And it's the logic that Ms. Gaddy runs afoul of in her
10 brief because much of her brief is dedicated to the
11 proposition that because the evidence in her view is
12 overwhelming that certain beliefs of the Church are false,
13 certain teachings of the Church are false they cannot be
14 sincerely held. No reasonable person could sincerely believe
15 what Joseph Smith said about the translation of the Book of
16 Mormon. And somehow she thinks that then provides an exit
17 ramp on the analysis in Ballard and other Supreme Court cases.
18 But, of course, it doesn't. The reasoning is circular. It's
19 circular in just exactly the way that Justice Stone's logic
20 highlights.

21 I'll say this, also. She cites to many RIFRA
22 cases, and that is also a diversion. This of course is not a
23 RIFRA case. We haven't pled RIFRA as a defense. And as Your
24 Honor correctly pointed out, RIFRA arises in the context where
25 someone is asking for an exemption from an otherwise generally

1 applicable law or regulation. And we're not asking for that
2 in this case. RFRA is inapplicable.

3 But even in the pre-RFRA cases under the Free
4 Exercise Clause we come to the exact same place. When the
5 conduct being complained about is the teaching and preaching,
6 it's not conduct at all for purposes of First Amendment
7 analysis. We only talk about the balancing test of RFRA or
8 pre-RFRA cases or state cases that are outside the scope of
9 RFRA when we're talking about conduct other than teaching or
10 preaching your religion.

11 Now, I could point you to specific sections of
12 Ms. Gaddy's brief, but all I really have to do is look at
13 Item 1 in the table of contents to her opposition, in which
14 she said: The amended complaint challenges defendant's
15 deceptive recruitment and indoctrinational practices, which
16 she then characterizes then as conduct, not belief. And by
17 deceptive recruitment and indoctrinational practices, of
18 course she's talking about the things that the Church teaches
19 and preaches. And that's absolutely protected. Not protected
20 in some conditional way, but absolutely protected by the
21 First Amendment.

22 So enough said about that aspect of things. I want
23 to say that I share Your Honor's view about this concept of
24 organizational sincerity. It certainly is true that
25 organizations can have at any given point in time what they

1 may describe as their orthodox doctrine. But to talk about
2 the sincerity of belief of an organization seems to me to be a
3 fraud concept, because of course sincerity is something that
4 is harbored in the individual human mind and heart. And as
5 Your Honor has correctly pointed out, different people at
6 different points in time may take a different view of what
7 they consider to be orthodox and nonorthodox. And to pretend
8 that somehow we have the ability to discern some
9 organizational sincerity of belief seems to me to be an
10 unworkable concept right from the beginning.

11 And then of course we should say something about
12 the problem of what I think of as a slight-of-hand analysis by
13 Ms. Burningham of the elements of fraud. There's a reason
14 that falsity is the first element of fraud. Her idea that
15 somehow we bifurcate the proceeding and we don't talk about
16 truth or falsity, we just talk about some concept of sincerity
17 and then we come back to the truth or falsity issue at some
18 later phase of the proceeding seems not only to be unworkable
19 for the reasons that Justice Jackson has indicated, but
20 completely inconsistent with the way the law is structured.
21 Truth or falsity is the first element of fraud because you
22 can't know something to be untrue or be insincere in your
23 belief as to its untruth if it's in fact true.

24 And so because in order to prove any fraud claim
25 you have to prove that the representation was false because

1 you can't get to the next step until you get over that hurdle
2 any discussion of insincerity is irrelevant. You can't reach
3 it without deciding whether or not the representation is false
4 in the first place. And if it's not a subject that's
5 justiciable and clearly for all the reasons Your Honor has
6 indicated in your original opinion and in your preliminary
7 opinion today, it's not justiciable then we never even come to
8 the issue of insincerity.

9 I do want to say a word about the Utah Charitable
10 Solicitations Act. I have it in front of me. It's
11 Section 13-22-13. And the applicable subdivision says that
12 it's prohibited that any organization, anybody is prohibited
13 from making any untrue statement of a material fact or failing
14 to state a material fact necessary to make statements made in
15 the context of the circumstances under which they are made not
16 misleading.

17 So again, truth and falsity are at the heart of
18 that statute. And of course one cannot reach the issues of
19 truth or falsity without trampling on the First Amendment. So
20 that is going to be an unavailing cause of action that should
21 of course be dismissed on this complaint.

22 I'll also point out, and this is pointed out in our
23 briefs so I won't belabor it, there is no private right of
24 action under that statute, so that's an independent reason why
25 Your Honor ought to dismiss the claim.

1 Your Honor posed an interesting question to
2 Miss Burningham. You said words to this effect, as I noted
3 them down, is the truth static? That's an interesting
4 question because I think the case law is clear that any
5 religion, any religious organization is the owner of its own
6 historical narrative. And the understanding that people have
7 at any given point in time of the significance of any element
8 in that historical narrative is owned by the religion and not
9 by the courts. And it's not for anyone to say under the
10 establishment clause what's orthodox and what's not orthodox,
11 what's heresy and what's not heresy at any given point in
12 time.

13 So, for example, and I hope my Catholic friends
14 will forgive me for this analogy which has no basis in fact, I
15 offer it only by way of analogy. The Catholic Church for
16 many, many years taught the Doctrine of Transubstantiation,
17 that in some miraculous and mystical way the host and the wine
18 were transmuted into the body and blood of Christ. Now that's
19 not a doctrine of the Church of Jesus Christ of Latter-Day
20 Saints, but long taught by the Catholic Church.

21 Let's just imagine hypothetically for a moment that
22 in some private setting Pope Francis said, you know, I don't
23 really believe that and I never did. The idea that we would
24 now subject the Catholic Church to lawsuit because
25 Pope Francis has decided that his view of the Doctrine of

1 transubstantiation has evolved in some way to me is foolish
2 and leads us head long into the establishment clause.

3 And that's because I think as the Bryce case
4 articulately points out, and this is also very much underlying
5 the Mary Elizabeth Blue Hull case, it's not the province of
6 government including the courts to define now or at any point
7 in time what is orthodox and what is heretical, because that
8 is a direct assault upon the establishment clause, because if
9 the government either through statute or through decisions of
10 the courts get into the business of deciding what is orthodox
11 and what is heretical, it is in a very real way establishing a
12 religion.

13 I point that out because I think it is the answer
14 to Ms. Burningham's suggestion that the Court ought to venture
15 into the world of deciding what's a truth, what's a half
16 truth, what's a partial truth. That seems like a fraught
17 escapade for the Court to me, because in order to do that the
18 Court would have to make this kind of a declaration.
19 Missionaries of the Church of Jesus Christ of Latter-Day
20 Saints may no longer teach the Church's official version of
21 the First Vision without giving the person that they're
22 teaching a warning that in an account of the First Vision
23 offered in 1833 Joseph Smith is reported to have not mentioned
24 two personages but to have only mentioned one personage in his
25 vision. It's almost like saying we're going to treat religion

1 like the way the state of California treats warnings about
2 prospective cancer dangers. This particular teaching is known
3 to the state of California to be misleading to potential
4 converts. That seems to me to be the height of foolishness.

5 You cannot teach about the Book of Mormon or say
6 that it was translated by the gift and power of God without
7 saying that sometimes Joseph Smith was not looking at the
8 plates. Sometimes he was looking at a brown stone. That's
9 Ms. Gaddy's view of the role of the courts, to decide what is
10 orthodox and what is not orthodox, what is heretical and what
11 is not heretical, and that is a very bad place to go.

12 And I can't do a better job than Ms. Gaddy did in
13 pointing out to the Court that these are core religious
14 beliefs or as the Court describes them in your original order
15 religious facts which are the subject of faith, I can't do a
16 better job than she did in illustrating that they are
17 religious facts about faith than to re-put up for you the
18 things that she shared with us on the screen about the war in
19 heaven and the philia relationship between Jesus Christ and
20 Lucifer or the role of human agency in the salvific process.
21 I think she illustrated admirably that these are in fact
22 matters of faith that are religious in nature and not as the
23 Bryce case teaches us, purely secular matters. So I won't say
24 anything more about that.

25 I do want to say, Your Honor, in conclusion that --

1 THE COURT: So before you --

2 MR. JORDAN: Yeah, please.

3 THE COURT: Before you conclude let's not skip over
4 my comments about her fraud theories. I'm concerned now after
5 hearing from Miss Burningham that I misconstrued or
6 misunderstood what I saw to be an evolution in her arguments
7 about fraudulent nondisclosure or omission. And maybe it's,
8 maybe I do have it wrong. Maybe she's talking about material
9 omissions.

10 MS. BURNINGHAM: Yes, Your Honor. Material.

11 MR. JORDAN: I think it matters not at all, Your
12 Honor, because for Your Honor to decide what is material to a
13 religious belief and what's not material to a religious belief
14 is the same thing as Your Honor having to decide what's
15 orthodox and what's heretical. This court cannot decide that
16 a particular fact in a church's or a particular point of faith
17 in a church's narrative about its own origins is material and
18 what is not material. That's -- that is a -- that is a
19 forbidden territory for the Court to venture into.

20 THE COURT: So let's turn then to tithing, or maybe
21 you were headed in that direction.

22 MR. JORDAN: That is exactly where I was going, and
23 thank you for guiding me back there.

24 So I do understand I think what Your Honor has
25 said. I think I share a concern that we don't really have the

1 kind of pleading at this stage that ought to survive a
2 Rule 12(b)(6) motion to dismiss. So let me just speak to that
3 with some specificity.

4 I'm going to read now from Page 3, Paragraph 4 of
5 Ms. Gaddy's amended complaint. It says this:

6 Gaddy and others similarly situated pay 10 percent
7 of their earnings as consideration for the right to
8 participate in temple ceremonies which promise intact families
9 that are to last throughout eternity and/or to join the
10 church. Without that payment entrance is denied. Absent COPs
11 underlying scheme of lies which form the basis for members'
12 beliefs tithing would not be paid.

13 Of course then she launches into her exposition of
14 the scheme of lies which focuses most predominantly on the
15 translation process of the Book of Mormon, the truth of LDS
16 scripture in the Pearl of Great Price, specifically the Book
17 of Abraham and the veracity of the church's teaching about the
18 First Vision, and particularly the fact that both God the
19 Father and his son Jesus Christ appeared to Joseph Smith in
20 that vision in April of 1820.

21 Well, if you're going to say as she does say that
22 the basis on which people were induced to pay tithing is the
23 preaching and the teaching of those doctrines which I just
24 read to the Court from her complaint together with her
25 statement that the inducement was that by paying tithing one

1 could receive the ordinance of baptism and thereby membership
2 in the Church and that eventually one would have the right to
3 participate in temple ceremonies so that they could receive
4 the promise of their family remaining intact throughout
5 eternity, you are in the same waters that Your Honor has
6 identified as forbidden.

7 You cannot allege that, I pay tithing so that I
8 could receive the ordinance of baptism with all its intended
9 blessings including the gift of the Holy Ghost and so that I
10 could enter the temple and receive sacred temple ordinances so
11 that I could receive the blessing of an internal family.

12 You cannot make those allegations and say that
13 there was fraud in the inducement in the payment of tithing or
14 fraud of any kind because you have grounded your claim, you
15 have grounded your claim in matters of religious faith, or as
16 Your Honor has described it, religious facts.

17 Well, whether or not people actually receive the
18 gift of the Holy Ghost as a blessing of baptism I don't think
19 is for the courts to adjudicate. Whether or not families can
20 actually remain intact in the eternities after this life
21 because of temple ordinances received in part by qualifying
22 yourself through the principle of tithing, I don't think is
23 for any court in the land to adjudicate. But that's the way,
24 Your Honor, that she's alleged it.

25 I think Your Honor has been, if I can be this bold,

1 overly generous to her pleading in describing it as something
2 that flows from her RICO allegations. I do not believe that
3 is the gravamen of this amended complaint. I believe the
4 gravamen of this amended complaint is what I have just quoted
5 from.

6 So that being said, Your Honor, where does that
7 leave us? You suggested two possible courses of action.

8 THE COURT: Before you move on --

9 MR. JORDAN: Go ahead.

10 THE COURT: -- maybe I didn't articulate it as
11 well. I wasn't trying to articulate it fully in my opening
12 comments, but I don't want to deprive you an opportunity to
13 respond to this as I have to try to make sure that
14 Miss Burningham had a chance to respond to preliminary views
15 that I have.

16 I think what you just described is how I read the
17 Third Cause of action in the complaint, at least in part. And
18 you're talking about the gravamen of the complaint, and I
19 don't even know if I take exception with the way you described
20 the gravamen of the tithing allegations in the complaint.

21 But as you know, I have to consider all of the
22 allegations in the complaint. And at this stage plaintiffs
23 may plead alternative theories. They may plead even
24 internally inconsistent theories at this point so long as
25 they're pled in good faith consistent with Rule 11, and I

1 presume these are.

2 And so the fact that religious components of the
3 tithe may bar the Court under Ballard and its progeny from
4 considering the Church's teachings, whether the tithe is
5 required and what amount, for what purpose, how it's decided,
6 and of course you do address this in your papers, how the
7 tithe will be used as doctrinal. I think you've made a strong
8 case for that. It's in the texts, some of the canons.

9 But it doesn't escape an allegation, I don't think,
10 or if you think otherwise let's talk about it, that any church
11 anywhere could make a misrepresentation about how it was going
12 to use funds it was soliciting from its church members.

13 And Justice Jackson I think shares my view about
14 that in the same opinion that I am so enamored with. At the
15 end of his decision, he says: I do not doubt that religious
16 leaders may be convicted of fraud for making false
17 representations in matter other than faith or experience, as
18 for example, if one represents that funds are being used to
19 construct a church when in fact they're being used for
20 personal purposes.

21 And I think that's consistent with virtually all
22 the courts that I've read who have weighed in on the question
23 of money and the solicitation of money and the use of money by
24 churches. I'm left with an impression from the cases that
25 churches have no obligation to speak on the question of how

1 they're using a tithe or other donations to the Church. But
2 if you do speak and your membership relies on it to their
3 detriment and you speak falsely of the matter of finance, I'm
4 not saying in every case, but it seems to me it would be an
5 unusual case where that would be a spiritual doctrinal issue
6 as opposed to a secular issue.

7 And that's what -- I do read allegations, I think I
8 read -- I mean, I've studied this pretty carefully trying to
9 make sense of it. I think Ms. Gaddy pleads among other
10 things, you've told your congregation you don't use tithings
11 for certain commercial purposes, and then you did. You used
12 them in support of a for profit venture, to build a mall.
13 That has nothing to do with faith. It has to do with, what
14 did you do with the money that we gave you?

15 And your response, if that's right, if I'm reading
16 the complaint correctly and if I'm understanding the law
17 correctly then we have the Subpart C alternative theory in the
18 racketeering claim, the fifth cause of action, that seems of a
19 different kind than the other tithing allegations. But what
20 do you say about that?

21 MR. JORDAN: Yeah. I do take your point. As I
22 say, I think it's far too generous of a reading of the
23 complaint. Let me read from Paragraph 20. This is her
24 description of the scheme -- excuse me -- Paragraph 200. This
25 is her description of the scheme or schemes to defraud Gaddy

1 and other class members.

2 It was by making false statements the substance of
3 which it did not sincerely believe to which Smith's account of
4 his First Vision was one where two persons appeared, one of
5 whom told him that all creeds were false, that Golden Plates
6 were the source from which Smith translated the Book of
7 Mormon, no seer stone was used in its creation, that the
8 Hebrew prophet Abraham wrote upon the papyri used by Smith to
9 translate the Book of Abraham and that the facsimiles included
10 therein depict Abraham; and/or, B, failing to disclose
11 material fact about LDS history; or, C, misstatements of fact
12 about how the Church used or would use tithing.

13 And it's that C that I think Your Honor is
14 highlighting.

15 But my point is this. If that's attempted to be
16 pled it's poorly pled, so poorly pled and not argued in the
17 opposition brief in any significant way, certainly not in the
18 way Your Honor has described it, that I don't believe this
19 issue has been briefed to Your Honor in the way that it ought
20 to be and certainly not in the way that would create the sort
21 of appellate record that one would want if either side chooses
22 to avail themselves of an appeal in this case.

23 And for that reason, I want to hark to a suggestion
24 I think Your Honor was making. Either Your Honor ought to
25 direct the parties to more fully brief this tithing issue,

1 which of course we would be happy to do so that we do have the
2 kind of record that we ought to have; or, I think you
3 suggested this, I don't know what Ms. Burningham's disposition
4 on point would be, or alternatively we ought to have a second
5 and final amended complaint where she does in fact lay out the
6 theories that Your Honor has alluded to. And then upon
7 reviewing that complaint we will address them with an
8 appropriate motion if appropriate.

9 I'm happy to proceed in either way. But I don't
10 think we have the kind of record based on the pleadings as
11 they now exist or the briefing as Your Honor now has it to
12 create the kind of clarity that I think Your Honor is entitled
13 to or that I believe an appellate court would be entitled to.

14 THE COURT: Let me speak briefly to that before we
15 hear again from Miss Burningham. And this is not a discussion
16 that we ordinarily have in a hearing because in my judgment
17 this issue was not squarely presented by the motion or the
18 opposition. I'm raising the question given the unusual
19 circumstances of this case and where I think we would be left.
20 And I don't by those comments or my preliminary comments mean
21 to suggest any criticism of the lawyers for either side.
22 We've advanced and developed in the papers your arguments.
23 They're good and germane arguments on both sides to this
24 complain and its viability. And I'm not asking for a
25 commitment from any of the lawyers, either. You're both

1 entitled to an opportunity to consult with your clients before
2 you make a decision about how you wish to proceed. And in any
3 event, we don't know how I'm going to rule yet because I
4 haven't had an opportunity to digest your arguments today and
5 try to figure out how or if they change my preliminary
6 orientation coming to the bench. So it's premature at least,
7 and yet it seemed to me under the circumstances just under
8 fair notice to be in transparent for me to share my concerns.

9 I will say in response to your comments,
10 Mr. Jordan, I don't believe it would be fair for me to invite
11 further briefing on the issue because I think what I would be
12 doing is inviting a new Rule 12 motion, and I don't think
13 that's contemplated by the rules. The defendants, unless you
14 can persuade me that I misread your papers, I think it's just
15 the sufficiency or plausibility of the pleading was not really
16 at issue. I understood your argument to fall squarely in
17 invoking the Church autonomy doctrine as a defense to this
18 complaint. And I think I'm required to evaluate each part of
19 each claim individually, and that's what I propose to do. So,
20 look, we don't want a 100-page brief addressing every legal
21 argument that can be made here, and I'm not proposing that is
22 required or even it would be helpful.

23 That said, Miss Burningham, if you were left with
24 this complaint and one part of one claim that may not be pled
25 the way that you would like to have it that I suspect would

1 draw another motion from the defense, not a Rule 12(b) motion,
2 but some other rule, would you rather have it drawn to a
3 different complaint? And again, you have an opportunity to
4 speak to your client. But if you have thoughts or feelings
5 about how you think we should proceed procedurally I'd love to
6 hear them today. And I'm not going to hold you to them.

7 MS. BURNINGHAM: Well, Your Honor, I would need to
8 speak with my clients, and I would need some time to get back
9 to you on that. I don't think I can speak to that right now.

10 THE COURT: Fair. Totally fair. All right.

11 Ms. Burningham, what if anything do you have to say
12 in response to Mr. Jordan's substantive arguments about the
13 motion?

14 MS. BURNINGHAM: Thank you, Your Honor. Just five
15 or 10 minutes, I would say.

16 As to the tithing argument and his claim there, you
17 can have different reasons, and I think you stated this well,
18 about what you do and why you do it. And one of the reasons
19 could be because you think you're going to get families are
20 forever by going to the temple, and another reason could be
21 that you believe that the tithing that you pay will be used
22 for religious purposes as are set forth in the tithing forms
23 that the Church sets forth. And that's all I will say on
24 that.

25 I would just like to speak to the issue of whether

1 a corporation --

2 THE COURT: Ms. Burningham --

3 MS. BURNINGHAM: -- can be --

4 THE COURT: Miss Burningham --

5 MS. BURNINGHAM: -- determined. I believe

6 Mr. Jordan spoke to that, and he said it would be difficult

7 and gave reasons why.

8 The case of Burwell vs. Hobby Lobby, which I cited
9 in my opposition says that, quote, says that: A corporation's
10 pretextual assertion of a religious belief in order to obtain
11 an exemption, this is under RFRI, for financial reasons would
12 fail.

13 So a corporation can be questioned about their
14 sincerity. I'm not saying that the Church here, the only
15 reason they exist is for financial gain. We know they have
16 \$128 billion, but I'm not saying that. I'm just saying that
17 corporate sincerity can be determined.

18 Then there's one final point I would like to make,
19 Your Honor. Mr. Jordan talked about and gave an example of
20 transubstantiation with the Catholic Church. Again this goes
21 back, and I hate to beat the dead horse, but it goes back to
22 the fact of doctrine dichotomy. Of course transubstantiation
23 is a doctrine. And a secular court is not equipped to
24 determine the truth or falsity of a doctrine.

25 That's obvious. That's not what we're doing. But

1 where the facts exist where the stone existed in the Church's
2 vault for over 100 years, that's a horse of a different color,
3 as they say in the Wizard of Oz. And it's just not the same.

4 THE COURT: I'm going to get this wrong.

5 MS. BURNINGHAM: I'm sorry. Are you laughing?

6 THE COURT: No. At myself.

7 MS. BURNINGHAM: I'm having a hard time hearing.

8 THE COURT: No. I'm sorry. I was laughing at
9 myself because I was trying to interrupt and I think you
10 couldn't hear me. I was going laughing because the example I
11 was going to use I think is --

12 MS. BURNINGHAM: I really can't hear you. I just
13 got a couple words there. I don't know if it's us.

14 THE COURT: Mr. Jordan's having trouble, too,
15 maybe. Can you hear me better now?

16 MR. JORDAN: A little bit.

17 MS. BURNINGHAM: No, we're not.

18 MR. JORDAN: It is difficult to hear you now, Your
19 Honor.

20 THE COURT: I'll speak up and see if I can try to
21 get through. Can you hear me now?

22 MS. BURNINGHAM: Not really.

23 THE COURT: Really?

24 MR. JORDAN: I can hear you a little better.

25 MS. BURNINGHAM: I'll listen closely.

1 THE COURT: One moment. Let me see if there's
2 something I can do to adjust the volume out.

3 MS. BURNINGHAM: It was a lot easier when we were
4 in person. I'm old school. And Mr. Jordan would be old
5 school since he's older than I am.

6 MR. JORDAN: What a cheap shot.

7 MS. BURNINGHAM: Sorry. Just by a bit.

8 THE COURT: Is this any better?

9 MS. BURNINGHAM: I heard that, what a cheap shot.

10 THE COURT: Is this any better? No? All right.

11 I'll do my best. And I don't think there's a lot
12 more that I have to say.

13 On the point that you were just making,
14 Miss Burningham --

15 MS. BURNINGHAM: That's better.

16 THE COURT: -- as I understand one of the tenets of
17 the Church of Jesus Christ of Latter-Day Saints is that the
18 prophet receives divine revelation. And the Mormon Church is
19 not alone in this view. The Catholic Church of today is not
20 the Catholic Church of 2000 years ago, and the Mormon Church
21 has announced doctrinal changes in its view, as well, as a
22 result of what it says are inspiration to its leadership.

23 MS. BURNINGHAM: Yes.

24 THE COURT: Doesn't that strongly support the point
25 that Mr. Jordan was making, that the doctrines of the Church

1 themselves are not static, that in different ways and
2 different times the leaders of this church and other churches
3 have been inspired, that things that were previously taught
4 are no longer doctrinal, and that in some instances new
5 doctrines are revealed to church leaders? And if you agree
6 that that happens, how does that impact your argument?

7 MS. BURNINGHAM: Yes. I certainly agree that that
8 happens. But the Church has had the stone in the vault for
9 over 100 years. That hasn't changed. The Church has known
10 from the very beginning how Joseph Smith used the brown stone
11 to create the Book of Mormon. And that's a fact. It's not a
12 doctrine.

13 THE COURT: Why do you say that's a fact? How do
14 you know that?

15 MS. BURNINGHAM: Because the existence of the
16 artifact.

17 THE COURT: So that means that is -- so that is
18 evidence to you of a fact about how it was used and for what
19 purpose and when?

20 MS. BURNINGHAM: Yeah. Along with the witness
21 statements that have been known since 1830.

22 THE COURT: And are you resolving conflicting
23 evidence --

24 MS. BURNINGHAM: Those are eye witnesses. Excuse
25 me.

1 THE COURT: Are you resolving conflicting evidence
2 in your own mind when you decide what in your view is truthful
3 and what is untruthful?

4 MS. BURNINGHAM: I just -- let me think about that.
5 Am I resolving conflicting evidence? No, because I'm not -- I
6 have to pause myself. I know what you're saying. But I'm
7 saying they could not have had a sincere belief that the stone
8 wasn't used when they had it for a century or more. They
9 could not have that belief. They could not legitimately or
10 credibly have that belief.

11 THE COURT: Okay. Go ahead. I interrupted. You
12 were finishing your argument.

13 MS. BURNINGHAM: That's all. And we can hear you
14 much better, by the way, as of five minutes ago.

15 THE COURT: Thank you.

16 Mr. Jordan, anything more from the defense before I
17 take the matter under advisement?

18 MR. JORDAN: I'll just say this, Your Honor, on the
19 tithing point. I do want to point Your Honor to Footnote 5 in
20 our opening brief on this motion to dismiss. It's the
21 Stone v. Salt Lake City case in which the Utah Supreme Court
22 says:

23 It is obvious that all of the funds the Church
24 collects would not be disbursed immediately and directly for
25 such purposes. It is but common sense and common knowledge

1 that there is need for the exercise of management of such
2 funds for the ultimate accomplishment of the purposes stated.
3 How this is to be done to best serve those objectives is for
4 those in charge of the management of the Church to decide. It
5 may well entail the keeping of collected funds in savings
6 accounts, bonds, real estate or any type of investment which
7 in the judgment of those in charge best suits that purpose,
8 close quotes.

9 All of that together with what I've said to Your
10 Honor about the doctrinal basis for tithing, about the
11 specific Subsection 120 of the Doctrine and Covenants, which I
12 have quoted to Your Honor, about the way the role that
13 inspiration plays, the way the voice of the Lord, the role
14 that plays in the disposition of tithing funds.

15 All of that I think speaks to the fact that Your
16 Honor will quickly find that the Court is in forbidden waters
17 by getting into the question of how tithing funds are used or
18 invested or how earnings from tithing funds are used. That
19 just seems to me to be an extremely fraught area forbidden by
20 the First Amendment. And I would encourage the Court not to
21 go there, at least not on the pleadings that you have before
22 you, which describe the motivations for the payment of
23 tithings in the very religious context of that is the way that
24 one receives admission into the Church through baptism or the
25 way that someone receives the opportunity to have temple

1 ordinances which promise blessings of eternal families.

2 All of that to me seems to be so significantly
3 intertwined as to risk the Court entangling itself in a way
4 that would be violative of the First Amendment. Whether
5 Miss Gaddy could plead something different than she's now pled
6 rather than the entangled way that it's currently pled, I
7 don't know. But I think on this pleading Your Honor would do
8 well to avoid the entanglement which she invites. That's my
9 last word on that subject, Your Honor.

10 THE COURT: And it might not be because I'd like to
11 follow up on that.

12 MR. JORDAN: Okay.

13 THE COURT: This is not the allegation in the
14 complaint, but let me make sure. Let me test the limits of
15 your argument.

16 If the leadership of the Church announced
17 inspiration from God that tithing should now be 11 percent
18 instead of 10 and the extra percent of tithe will be used to
19 construct temples in new countries around the world to better
20 facilitate the communication of the Church's core teachings,
21 and instead the Church diverts that extra 1 percent, and they
22 buy Ferraris for the members of the Quorum of the Seventy and
23 they buy private airplanes and the like, to use an extreme
24 example, the fact that tithe was the vehicle for that process
25 absolves it of potential civil liability in your view under

1 the First Amendment.

2 MR. JORDAN: No, I don't think so. Your Honor has
3 presented an extreme example, and I think at some point one
4 can run afoul of Justice Jackson's point in his dissenting
5 opinion in Ballard in just the way that I think Your Honor is
6 describing your hypothetical.

7 But I do want to hasten to say that's not what's
8 alleged here. And think of it this way in the light of the
9 Utah Supreme Court's opinion in Stone. What if the Church had
10 decided that it would invest tithing dollars, rather than
11 putting them in a mattress somewhere it would invest tithing
12 dollars in real estate, not for the personal -- for the
13 personal benefit of the First Presidency to drive Ferraris
14 around as you've suggested, but because that seems like a
15 prudent investment strategy, more prudent than putting things
16 in a mattress, putting money in a mattress, and then those
17 funds ultimately, those investment funds are used for
18 appropriate church purposes?

19 Now if you make that the hypothetical, and that's
20 even a step beyond the reality here, but I don't want to talk
21 about the reality because I don't want to invite the factual
22 dispute about it. But if you even take that as the
23 hypothetical, then the complaint goes nowhere at all, because
24 as the Utah Supreme Court says it's entirely up to the Church
25 as a matter of the Church autonomy doctrine how it invests

1 funds rather than putting funds in a mattress. And
2 investments strategies are entirely within the Church autonomy
3 doctrine and can be changed from time to time.

4 Ms. Gaddy hasn't and can't allege that Church
5 leaders used tithing funds for their personal purposes. The
6 most that she has to allege, and incorrectly so, but credited
7 for purposes of the motion to dismiss, the most that she can
8 allege is that the Church made a real estate investment.

9 If we ever got to discovery we would find out that
10 in fact tithing funds weren't used. But we'll take the
11 allegations on their face. The most she could say is the
12 Church made a real estate investment rather than putting
13 tithing funds in a mattress. And that's just not good enough.
14 That's just not good enough.

15 THE COURT: I don't think that's a fair
16 characterization of her allegations. And it's a 65-page
17 complaint, and I don't mean to be yelling. I'm speaking up so
18 you can hear me clearly.

19 MR. JORDAN: I can hear you, and it's better, Your
20 Honor.

21 MS. BURNINGHAM: No. You're good. We like it.

22 THE COURT: There is a specific allegation in the
23 complaint that Ms. Gaddy was watching during General
24 Conference when she saw the prophet of the Church say, no
25 tithing funds are going to be used in connection with the

1 construction of City Creek Mall, for example. And she says, I
2 saw that. I don't know if she said in her complaint she
3 relied on it.

4 MR. JORDAN: She doesn't.

5 THE COURT: She said that it's false. I don't
6 think she does that she relied on it. I don't know that I saw
7 that in the complaint. But thus that among other things that
8 are missing in a RICO allegation and thus my raising the
9 question about how I should treat it.

10 But do you mean in your argument, Mr. Jordan, to
11 suggest that your motion to dismiss squarely presented the
12 question of the plausibility or adequacy of her pleading up
13 that theory in the RICO claim?

14 MR. JORDAN: Yes, I do mean to suggest that,
15 because three things have not been alleged appropriately, at
16 least. One is falsity. What we have is a footnote quote that
17 is double hearsay in the Salt Lake Tribune. That's not an
18 allegation of falsity. Two, we have no allegation of
19 materiality. A fair reading of the complaint suggests that
20 Ms. Gaddy didn't stop paying tithing or kept paying tithing in
21 reliance on President Hinckley's statement, which is grossly
22 quoted out of context in a General Conference talk given in a
23 ecclesiastical meeting. But materiality is not alleged in any
24 way, and reliance is not alleged in any way.

25 The reliance that Miss Gaddy does allege is that, I

1 relied on the statement that I could be baptized and receive
2 the gift of the Holy Ghost through the ordinances of the
3 Church by committing to the principle of tithing. And I could
4 qualify myself to go to the temple to receive eternal
5 blessings of eternal families.

6 That's the causal link that is drawn here and the
7 only one. On this complaint as pled it falls woefully short.
8 And I do not believe in good faith that something else could
9 be alleged in yet another amended complaint.

10 But faced with these allegations, whether you want
11 to describe President Hinckley's statement as a purely secular
12 one, which I think if you read it in context you would not
13 construe it in that way, but if you did construe it in that
14 way, she would still fall short on at least those three
15 pleading failures.

16 THE COURT: I'm going to put you in a really
17 difficult position right now. I'm going to ask you if what
18 you're saying is that your motion to dismiss presented that
19 argument to the Court for resolution. So the Church has
20 advanced that argument and placed it before the Court.

21 MR. JORDAN: No. It's not a hard -- it's not a
22 hard question. It's a fair question, Your Honor, and I
23 welcome it.

24 THE COURT: I just mean difficult because it may
25 implicate what is available in the future.

1 MR. JORDAN: Right. My point to that is the point
2 I tried to make before. The way this complaint is framed, the
3 description of why tithing is paid or not paid is tied to,
4 very clearly to the promise blessings of tithing, the
5 scripturally promised blessings of tithing. So I considered
6 it not a subject for briefing to make the arguments that Your
7 Honor just made. It's why I said to you a few minutes ago, if
8 this is really a subject of concern, if you don't feel that
9 the subject of tithing including President Hinckley's remarks
10 made in context are so entangled with religious practice as to
11 be out of bounds under the First Amendment then I would
12 appreciate the opportunity to more fully brief this to Your
13 Honor.

14 If on the other hand Miss Gaddy wants to take
15 advantage through her counsel of the opportunity I think
16 you've offered to file yet another amended complaint then I'll
17 address it in the context of a motion.

18 But I come back to the point which I tried to
19 possit before, and that is I think for the sake of this court
20 and for any appellate court who might review it, this aspect
21 of Ms. Gaddy's brief varied and obscurious as I think it is in
22 reference to President Hinckley's isolated quote, I don't
23 think we made the record on that that you or an appellate
24 court would want to have.

25 THE COURT: Thank you, Mr. Jordan. I guess we'll

1 go one step at a time. And Miss Burningham has already said
2 she would benefit from the Court's ruling first and then an
3 opportunity to consult with her client, and that makes good
4 sense to me. So I'll take the matter under advisement and --

5 MS. BURNINGHAM: Your Honor, excuse me. May I just
6 address the Stone case he brought up?

7 THE COURT: You may, of course. Yes.

8 MS. BURNINGHAM: It will take one minute. Thank
9 you, Your Honor.

10 Stone is differentiated because in Stone the
11 plaintiff did not allege fraud and there was no invited
12 directive. There was no partial, there were no blanks in the
13 tithing forms. Fill it in here, and we'll use it for this and
14 this and this. So this is different than the specific forms
15 as we have for the intent created by The church.

16 That's all, Your Honor.

17 THE COURT: Thank you both for your time and your
18 argument today, as well as your briefing. I will take the
19 matter under advisement. And you've given me a lot to think
20 about, so I'm afraid I probably can't give you great guidance
21 about when you can expect a ruling from the Court. But I
22 understand the importance of these issues to all involved, and
23 I can assure you we take the cases seriously as you do, and
24 we'll do the best we can to give you a good answer.

25 Thanks again, everyone. Please remain safe and

1 vigilant especially during these uncertain and dangerous
2 times, and we'll be in recess.

3 MS. BURNINGHAM: Thank you.

4 MR. JORDAN: Thank you.

5 (Whereupon, the court proceedings were concluded.)

6 * * * * *

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 STATE OF UTAH)

2) ss.

3 COUNTY OF SALT LAKE)

4 I, KELLY BROWN HICKEN, do hereby certify that I am
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of
7 the foregoing matter on January 5, 2021, and thereat reported
8 in Stenotype all of the testimony and proceedings had, and
9 caused said notes to be transcribed into typewriting; and the
10 foregoing pages number from 3 through 90 constitute a full,
11 true and correct report of the same.

12 That I am not of kin to any of the parties and have
13 no interest in the outcome of the matter;

14 And hereby set my hand and seal, this ____ day of
15 _____ 2021.

16

17

18

19

20

KELLY BROWN HICKEN, CSR, RPR, RMR

21

22

23

24

25